No. 74-1459

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION, ET AL.,
Appellants

v.

CITY COUNCIL OF THE CITY OF SAN DIEGO,
Appellee

Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

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SAN DIEGO BUILDING CONTRACTORS ASSOCIATION, ET AL.,
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v.

CITY COUNCIL OF THE CITY OF SAN DIEGO,
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Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

Appellants, San Diego Building Contractors Association and Associated General Contractors of America, San Diego Chapter, Inc., appeal from the decision of the Supreme Court of California, filed on December 26, 1974, reversing a summary judgment in favor of appellants entered by the Superior Court of the State of California on January 19, 1973. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction and that a substantial federal question is presented.

OPINIONS BELOW

The Memorandum Decision and Judgment of the Superior Court of California, County of San Diego (Appendix C, pp. A39-47), and the opinion and judgment of the Court of Appeal, Fourth Appellate District, Division One (Appendix B, pp. A26-38), are unreported. The majority opinion of the Supreme Court of California (Appendix A, pp. A1-16) is reported at 13 Cal. 3d 205, 118 Cal. Rptr. 146 (1974). The dissenting opinion (Appendix A, pp. A17-25) can be found at 13 Cal. 3d 205, 218, 118 Cal. Rptr. 146, 154.

JURISDICTION

Appellants, non-profit corporations composed of organizations and individuals who own property or are engaged in or otherwise interested in the construction of buildings and improvements on real property in the City of San Diego and specifically in the "Coastal Zone," brought this suit to challenge the constitutionality of a City of San Diego zoning ordinance (hereinafter "Proposition D"), which was adopted by the initiative process (Clerk's Transcript 5, 11).[1] The Supreme Court of California upheld the constitutionality of the ordinance in a decision filed on December 26, 1974. An order denying rehearing (Appendix D, p. A48) was filed on February 19, 1975. The notice of appeal (Appendix E, pp. A49-50) was timely filed by the appellants herein with the Supreme Court of California on April 8, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). A state court decision upholding the constitutionality of a municipal ordinance is a decision sustaining the validity of a state "statute" within the meaning of Section 1257(2).

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[1] Citation is to the Clerk's Transcript which served as the record in the courts below, a copy of which has been lodged with the Clerk of this Court. The Clerk's Transcript will be cited hereinafter as "CT" followed by the page reference.

King Mfg. Co. v. *City Council of Augusta*, 277 U.S. 100 (1928); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953); *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951); *Lathrop* v. *Donohue*, 367 U.S. 820 (1961). See also Stern & Gressman, *Supreme Court Practice* 83 (4th ed. 1969).

STATUTE INVOLVED

Proposition D, enacted by the voters of the City of San Diego as a municipal ordinance, provides:

> "BE IT ORDAINED, by the People of the City of San Diego, as follows:
>
> "Section 1. Notwithstanding any section to the contrary, no building or addition to a building shall be constructed with a height in excess of thirty feet within the Coastal Zone of the City of San Diego. The words Coastal Zone, as used within this Ordinance, shall mean that land and water area of the City of San Diego from the northern city limits south to the border of the Republic of Mexico extending seaward to the outer limit of city jurisdiction and extending inland to the location of Interstate 5, on January 1, 1971. This limitation shall not apply to that land area of the Coastal Zone bounded by National City on the south, San Diego Bay on the west and Laurel Street or the southwesterly projection of Laurel Street on the north.
>
> "The base or measurement of the height shall be in accordance with the Uniform Building Code of 1970.
>
> "Nothwithstanding any section to the contrary, there shall be no exceptions to the provision of this Ordinance.
>
> "Section 2. This Ordinance shall become effective upon the thirtieth day after receiving a majority of votes of the electors of the City of San Diego at an election held in said city."

QUESTION PRESENTED

Does zoning by popular initiative, without notice or hearing for affected property owners, violate the due process clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

On November 1, 1971, a petition was filed with appellee, the City Council of the City of San Diego, to cause a proposed initiative ordinance limiting the height of buildings in a prescribed zone to be placed on the ballot (CT 17). After certifying that the petition contained the signatures of more than ten percent of the qualified voters (*id.*), appellee submitted the proposed ordinance, Proposition D, to the qualified voters of the city at the November 7, 1972, general election (CT 14). Proposition D provided, without exception, for a thirty-foot height limitation on all buildings to be constructed within a prescribed "Coastal Zone" of the City of San Diego.[2] A majority of the electors voted for adoption of Proposition D (CT 3-4).

Appellants, San Diego Building Contractors Association and Associated General Contractors of America, San Diego Chapter, Inc., are non-profit California corporations whose memberships include, *inter alia*, organizations and individuals who own, or are engaged in or otherwise interested in the construction of buildings and improvements on, real property in San Diego, including real property in the "Coastal Zone" (CT 5, 11). On December 1, 1972, appellants filed a complaint for declaratory and injunctive relief in the Superior Court of the State of California alleging, *inter alia*, that they were denied "the use of property owned by them without due

[2] For the convenience of the Court, there is attached as Appendix F, p. A51, a map of the City of San Diego on which the "Coastal Zone" has been shaded.

process of law as guaranteed to all persons by the Fifth Amendment to the Constitution of the United States of America, made applicable to the states by operation of the Fourteenth Amendment to the Constitution of the United States of America" (CT 11).

Appellants moved for summary judgment asking the trial court to declare Proposition D void. Their motion was granted on January 19, 1973. The trial court found that Proposition D was void because, *inter alia*, it deprived affected property owners of property interests without affording them the due process required by the Fourteenth Amendment, in that no hearings were held prior to the enactment of the subject zoning ordinance (Appendix C, pp. A40-41).

Appeal was taken to the Court of Appeal, Fourth Appellate District, Division One, State of California. On November 16, 1973, an opinion reversing the trial court was rendered and judgment was entered in favor of appellee herein. The expressed basis of the Court of Appeal's holding was that the due process requirement of notice and hearing is satisfied by allowing the majority of voters to rezone property at an election (Appendix B, p. A38).

A petition for hearing was granted by the Supreme Court of California, thereby vacating the decision of the Court of Appeal. On December 26, 1974, the Supreme Court, in a 4-3 decision, reversed the trial court and upheld the constitutionality of Proposition D. The Supreme Court passed directly upon the question presented herein:

> "Plaintiffs . . . contend that . . . the 'due process' clause of the federal Constitution preclude[s] the city from adopting any zoning ordinance without affording all affected property owners 'notice and hearing' . . . . Although the trial court agreed with

> plaintiffs . . . , we have concluded that its decision was in error and, accordingly, we reverse." (Appendix A, pp. A1-2).
>
> "[W]e conclude that neither the [federal] Constitution nor the San Diego City Charter precludes the people of San Diego from enacting a general zoning ordinance through the initiative process." (Appendix A, p. A16).

Justice Burke, writing for a three-member minority, concluded in his dissenting opinion:

> "[I]t is evident that in its present operation the initiative process fails to afford that degree of protection necessary to satisfy due process requirements under the state and federal Constitutions." (Appendix A, p. A24).

THE QUESTION PRESENTED IS SUBSTANTIAL

In upholding the validity of Proposition D, the majority of the Supreme Court of California ruled that zoning by popular initiative without any provision for notice and hearing before a responsible decision-making body is consistent with due process. The decision below conflicts with long-standing decisions of this Court which, on due process grounds, recognized that exercise of the police power must be rational and thus precluded land use regulation by popular vote. The decision below also conflicts directly with decisions of the highest courts of several states which have held that zoning by initiative and zoning by government agencies without notice and hearing constitute a denial of due process. The effect of the ruling below is to permit a majority of the voters to restrict an individual's use of land without any safeguards to insure that such zoning decisions are reasonably based on the facts and law and in terms of the public welfare.

The question presented thus raises a substantial and fundamental issue concerning the relaticnship between due process and popular elections. This issue goes to the essence of the common law right to own and use property, and to the balance between that right and the procedural limits of the due process clause on the exercise of the police power.

I. DECISIONS OF THIS COURT ESTABLISH THAT ZONING BY INITIATIVE VIOLATES DUE PROCESS

Inherent in the process of zoning is governmental restriction of an individual's use of property and often the consequent devaluation of that property. Such is clearly the effect of Proposition D (CT 70-71). The power of the state to limit an individual's use of property was recognized by the Supreme Court in the landmark cases of *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928). These cases established the proposition that zoning restrictions do not constitute a violation of due process as long as the restrictions bear "a substantial relation to the public health, safety, morals, or general welfare." *Id.* at 188; see *Euclid*, *supra*, 272 U.S. at 387, 395. The balance struck by the Court under the due process clause permits an individual's property rights to be infringed in favor of the publicly based goals of a rational zoning policy. Where zoning restrictions are not rationally based, they are violative of the Fourteenth Amendment. *Nectow* v. *City of Cambridge*, *supra*, 277 U.S. at 188-89.

Zoning by popular vote, however, subjects the property rights of every individual to the mercy and whim, selfish or otherwise, of the majority, and thus is not readily guided by the due process standards required by Euclid. Recognizing this potential for arbitrariness, this Court in

Eubank v. *City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), held that land use restrictions imposed without notice and hearing by the collective action of area property owners violate the due process clause of the Fourteenth Amendment. The decision below is in conflict with these two cases and thus presents a substantial and fundamental question for this Court.

In *Eubank*, a property owner challenged an ordinance of Richmond, Virginia, and the statute under which it was enacted, on the ground that he was deprived of property rights without due process of law. The statute authorized municipalities to establish building setback lines and height limits and the Richmond ordinance conferred the power to establish setback lines upon the owners of two-thirds of the property abutting any street. Upon petition to the "committee on streets," signed by two-thirds of the relevant property owners, plaintiff's property was subjected to a setback. In state proceedings in which plaintiff was fined for failing to obey the setback line, he defended unsuccessfully on the ground that the ordinance was invalid as a deprivation of property without due process of law.

This Court reversed, noting that the police power of the state was involved and that such power was extensive, but not without limitation. *Eubank*, *supra*, 226 U.S. at 142-43. The Court noted further that the ordinance left no discretion with the pertinent city officials, and that no standards were furnished which would guide the exercise of the police power. Using words equally applicable to the case at bar, the Court stated:

> "In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. . . . In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property owners to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously." *Id.* at 143-44.[3]

In *Roberge*, this Court invalidated a zoning ordinance which, *inter alia*, allowed for the establishment of philanthropic homes for the aged in residential zones, but only upon the written consent of the owners of two-thirds of the property within four hundred feet of a proposed home. Upon being denied a building permit because of his failure to secure the two-thirds written consent, the trustee of such a philanthropic home attacked the ordinance on the grounds that it was "arbitrary and repugnant to the due process and equal protection clauses of the Fourteenth Amendment." *Roberge*, *supra*, 278

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[3] The Court invalidated the ordinance, not because the particular restriction was unreasonable, but rather because the procedures utilized were not consistent with due process.

> "We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property rights of others . . . . This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power." *Eubank*, *supra*, 226 U.S. at 144.

Thus, the inquiry called for by *Eubank* is not whether the substance of Proposition D is "reasonable" under *Euclid*, but whether the procedures followed were consistent with due process. The trial court's observation in this regard is instructive:

> "Today we may have a commendable attempt to save our coast. But tomorrow, if the procedure is permitted, the majority of the electors may vote to zone one side of a residential street for used car lots, and the residents in that area, deprived of a fair hearing, would be unable to test the appropriateness of such decision." Appendix C, p. A45.

U.S. at 119-20. Justice Butler, speaking for a unanimous Court, stated:

> "The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home . . . . There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. [citation omitted]. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank* v. *Richmond*, 226 U.S. 137, 143." *Roberge, supra*, 278 U.S. at 121-22.

In *Eubank*, *Roberge* and the instant case, there was a substantial interference with property rights brought about by, respectively, petition, written consent and a vote of the citizens. In each instance, the decisionmakers —the property owners in *Eubank* and *Roberge*, and the voters of San Diego here—were free to act solely for their own interest, capriciously, selfishly, arbitrarily, or even as a matter of taste. The decision below sanctions just such a procedure for exercise of the zoning power and, accordingly, squarely conflicts with the holdings and rationale of *Eubank* and *Roberge*.[4]

The court below, without mentioning *Eubank* or *Roberge*, relied on a 1915 case, *Bi-Metallic Investment Co.*

[4] Despite the proliferation of zoning to nearly all communities, the Court has not, since *Roberge*, had to deal with any case challenging the procedural validity of zoning by initiative. Last term in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), the Court upheld the substance of an ordinance limiting the number of unrelated individuals who may occupy a home. In so doing, the Court discussed and distinguished *Roberge*, (*Village of Belle Terre* v. *Boraas*, *supra*, 416 U.S. at 6-7), but did not decide the question herein presented.

v. *State Board of Equalization*, 239 U.S. 441, as authority for its conclusion that zoning by initiative is consistent with due process. *Bi-Metallic* concerned the validity of an increase ordered by the Colorado State Board of Equalization in the valuation of *all* taxable property in the City of Denver. The order was challenged by a Denver property owner who claimed the increase violated the due process clause because it was not preceeded by notice and hearing. The Court upheld the ordinance holding that the equalization ordered by the board was a legislative act affecting all citizens in Denver alike and, like other "[g]eneral statutes," did not require notice and hearing. *Id.* at 445.[5]

Bi-Metallic, however, is clearly inapposite to the instant case. There, the challenged order affected all Denver property owners alike and was assumed to bring Denver's tax rate into conformity with the rest of the state. *Id.* There was no question of particular burdens falling on a discrete group of property owners as there was in *Eubank* and *Roberge* and as there is in the instant case.[6] In addition, the order in *Bi-Metallic* was passed by a responsible organ of government, not by a vote of the electorate subject to the arbitrary tendencies condemned by *Eubank* and *Roberge*. Finally, *Bi-Metallic* involved tax equalization, not land use. Unlike other legislative acts, zoning, which directly infringes on individual property rights, has traditionally been subjected to procedural limitations.

[5] Contrary to the view of the majority below, zoning, although technically a "legislative" act, is not like other general legislation because it affixes to specific land. Thus, enactment of a zoning ordinance has characteristics of case adjudication requiring some due process safeguards in addition to whatever charactertistics it may share with ordinary legislation.

[6] The Court recognized this factor in distinguishing *Londoner* v. *Denver*, 210 U.S. 373 (1908). *Bi-Metallic*, *supra*, 239 U.S. at 445-46.

In sum, by relying erroneously on *Bi-Metallic*, the court below brought itself into direct conflict with this Court's long-standing decisions in *Eubank* and *Roberge*.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS

In deciding that zoning by initiative is consistent with the due process clause of the Fourteenth Amendment, the Supreme Court of California has placed itself in direct conflict with the decisions of the highest courts of several states. The Supreme Courts of Arizona and Ohio, contrary to the court below, have recently invalidated land use regulation by popular vote as inconsistent with the principles of due process enunciated in *Eubank* and *Roberge*. In addition, the decision below explicitly holds that notice and hearing are not required prerequisites to zoning actions[7] and in this respect is inconsistent with the decisions of the highest courts of several states.

The decision below squarely conflicts with the decision of the Supreme Court of Arizona in *City of Scottsdale* v. *Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968). The Scottsdale City Council had passed an ordinance rezoning a section of the city from single family usage to commercial usage. Shortly thereafter an initiative petition was filed with the city clerk proposing that the area in question not be rezoned as provided by the ordinance. Property owners who favored the commercial rezoning then sought a declaratory judgment that the issue could not validly be made the subject of an initiative. The trial court held that a zoning ordinance could not be the subject of an initiative petition and an unanimous Arizona Supreme Court affirmed. Citing a long line of cases from several states, the State Supreme Court concluded:

[7] Appendix A, pp. A15-16.

> "Thus it is clear and we hold that the initiative process is not available as a mode for amending a comprehensive zoning plan. It is in irreconcilable conflict with the due process clause of the United States Constitution, 14th Amendment. See generally, *Eubank* v. *City of Richmond*, 226 U.S. 137 . . ., *State of Washington, ex rel. Seattle Title & Trust Co.* v. *Roberge*, 278 U.S. 116. . . ." 439 P.2d at 293-94.

The decision below also conflicts with a recent decision of the Supreme Court of Ohio, *Forest City Enterprises, Inc.* v. *City of Eastlake*, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975). There, the Eastlake city charter required that any ordinance which changed existing land use must be approved by 55 percent of the voters in a city-wide referendum election. The Supreme Court of Ohio addressed the constitutionality of the mandatory referendum procedure on the basis that it would be used only on zoning matters deemed legislative, such as a broad amendment to a comprehensive zoning plan. The court specifically discussed and analyzed this Court's decisions:

> 'The focus of our inquiry then, is whether Eastlake's mandatory referedum provision allows the exercise of legislative power by the voting public, such that zoning regulations might be imposed which are arbitrary and unreasonable.
>
> "The Supreme Court of the United States has addressed this issue. In *Eubank* v. *Richmond* . . . ; *Thomas Cusack Co.* v. *Chicago*, (1917) 242 U.S. 526 . . . ; and *Washington ex rel. Seattle Title Trust Company* v. *Roberge* . . . , that court established guidelines by which an appropriate due process determination might be made." *Forest City, supra*, 324 N.E.2d at 744.[8]

[8] The court's explanation of the due process limits of zoning is instructive:

[Footnote continued on page 14]

After a detailed analysis of *Eubank* and *Roberge*, the court concluded that they were controlling and invalidated the referendum procedure stating:

> "No standards were established whereby [the] action would be reasonable, rational and unarbitrary. Nor, indeed, could any be. Applying the principles enunciated by the Supreme Court, the Eastlake referendum requirement denied appellant due process of law.
>
> "Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. *McGautha* v. *California* (1971), 402 U.S. 183, 256, 270 . . . . The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational. For these reasons, the provision clearly violates the due process clause of the Fourteenth Amendment." *Forest City, supra,* 324 N.E.2d at 746.

The principles laid down in *Eubank* and *Roberge* were also followed in *DuPont* v. *Liquor Control Commission,*

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[8] [Continued]

"Since *Euclid* v. *Ambler Realty Company* . . . the constitutionality of zoning has not been questioned. Modern authorities agree that some restrictions on the use of land are essential to orderly community development. But, because the power to zone infringes upon the individual use of private property, the exercise of such authority has been carefully hedged with procedural and substantive safeguards." *Forest City, supra,* 324 N.E.2d at 743.

136 Conn. 286, 71 A.2d 84 (1949); *Marta* v. *Sullivan,* 248 A.2d 608 (Del. 1968); *State ex rel. Foster* v. *Minneapolis,* 97 N.W.2d 273 (Minn. 1959); *Concordia Collegiate Institute* v. *Miller* 301 N.Y. 189, 93 N.E.2d 632 (1950).

Other state decisions, generally relying on a state statute or state constitutional provision, have invalidated zoning by initiative as being violative, *inter alia,* of fundamental fairness and due process. These decisions thus are inconsistent with the decision below. See, *e.g., State ex rel. Powers* v. *Donohue,* 368 S.W.2d 432 (Mo. 1963); *Forman* v. *Eagle Thrifty Drugs and Markets, Inc.* 516 P.2d 1234 (Nev. 1973); *Smith* v. *Township of Livingston,* 106 N.J. Super. 444, 256 A.2d 85 (1969).

In reaching its result, the majority below, relying almost entirely on *Bi-Metallic,* necessarily had to decide as a general matter that the due process clause does not require notice and hearing prior to zoning changes.[9] Thus, in addition to conflicting with state cases which invalidate land use regulations passed by popular vote, the decision below also conflicts with many state cases which have held zoning ordinances enacted by other means void for lack of adequate notice and hearing.

The Supreme Court of Arizona in *Wood* v. *Town of Avondale,* 72 Ariz. 217, 232 P.2d 963 (1951), struck down a building setback ordinance which was enacted by the town council without notice being afforded to affected property owners. The court ruled:

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[9] In so doing, the majority explicitly disapproved contrary language from a long line of California cases. In these cases, *e.g., City of Escondido* v. *Desert Outdoor Advertising, Inc.,* 8 Cal. 3d 785 (1973); *Scott* v. *City of Indian Wells,* 6 Cal. 3d 541 (1972); *Gigert* v. *Stockton Port District,* 7 Cal. 2d 384 (1936); and *Hurst* v. *City of Burlingame,* 207 Cal. 134 (1929), the Supreme Court of California had held that due process required notice and hearing prior to enactment of a zoning ordinance. The court below stated: "To the extent that such statements are inconsistent with our present opinion they are disapproved" (Appendix A, p. A14).

> "Property owners are entitled to notice before the passage of a zoning ordinance which would limit the use of their property." *Wood*, *supra*, 232 P.2d at 964.

It held that the ordinance was "unconstitutional in that it deprives appellants of their property without due process of law." *Id.* at 964.[10]

The Supreme Court of Georgia in *Bell* v. *Studdard*, 220 Ga. 756, 141 S.E.2d 536 (1965), applied the Georgia Constitution, Art. I, Sec. I, Par. III, which provides, "[N]o person shall be deprived of life, liberty, or property, except by due process of law," to a zoning ordinance which had been enacted without notice and hearing. The court in *Bell* held:

> "Nowhere in said ordinance . . . does there appear any language providing for hearing and notice of hearing to the property affected thereby. It is clearly in contravention to the constitutional requirements of due process [citations omitted] and is therefore unconstitutional and void." *Bell*, *supra*, 141 S.E.2d at 539.

In *Calawa* v. *Town of Litchfield*, 296 A.2d 124 (N.H. 1972), an ordinance, passed without notice and hearing, was invalidated by the New Hampshire Supreme Court. The court, recognizing that the statutory procedural requirements were grounded in due process, stated:

> "In delegating to the towns and cities the authority to enact zoning ordinances the legislature provided for notice and hearing as a prerequisite to the valid enactment of the ordinance . . . . These provisions spell out a fundamental requirement of due process that before substantial restrictions are placed upon an individual's use of his property there must be notice and opportunity to be heard afforded the property owners concerned . . . . The notice provisions were not a requirement that might have been omitted from the original legislation without invading a constitutionally protected interest. The legislative act was therefore ineffective to validate the zoning amendment here." *Id.* at 125.

[10] The only constitutional provision discussed by the court in *Wood* was the "14th Amendment of the U.S. Constitution." *Wood*, *supra*, 232 P.2d at 964.

For decisions similar to *Calawa*, see *Anderson* v. *Judd*, 404 P.2d 553 (Col. 1965); *Citizens for Better Government* v. *County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973); *Glaspey & Sons, Inc.* v. *Conrad*, 83 Wash.2d 707, 521 P.2d 1173 (1974); *Edelbeck* v. *Town of Theresa*, 57 Wis. 2d 172, 203 N.W.2d 694 (1973).

III. THE CASE PRESENTS A SUBSTANTIAL AND FUNDAMENTAL QUESTION REGARDING THE RELATIONSHIP BETWEEN THE DUE PROCESS CLAUSE AND POPULAR ELECTIONS

A. The Relationship Between Due Process and Popular Elections.

This Court has uniformly held that the due process clause of the Fourteenth Amendment precludes the state from denying or restricting an individual's use of his property without some form of procedural safeguards. Thus, the Court has held that notice and a hearing before an impartial body are required before a driver's license can be revoked, *Bell* v. *Burson*, 402 U.S. 535 (1971); welfare benefits cut-off, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); property garnished, *North Georgia Finishing, Inc.* v. *Di-Chem., Inc.*, —— U.S. ——, 43 U.S.L.W. 4192 (Jan. 22, 1975); or public employment terminated, *Board of Public Regents* v. *Roth*, 408 U.S. 564 (1972). In each of these situations, the Court applied the rule that before the state can restrict an individual's property rights, procedures must be followed which insure that the deci-

sion is impartially based on the facts and the relevant law.

Although popular elections are the cornerstone of the Constitution and, indeed, our entire democratic system, it is clear that due process would not allow decisions such as were involved in the above cited cases to be made by popular vote. Notice and hearing insure an impartial decision based on the facts and the law. By contrast, popular elections carry with them none of the safeguards of a hearing and would subject the property rights in question to the standardless and unreviewable whim of the majority. Much as the Constitution would not permit an individual's driver's license to be revoked by a standardless popular vote, it likewise should not be held to permit a majority of voters to dictate, in standardless fashion, how an individual may or may not use his land. As this Court stated in *West Va. State Bd. of Education* v. *Barnette*, 319 U.S. 624, 638 (1943):

> "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The substantial and fundamental question presented by this appeal is whether zoning decisions are the type of governmental restraint on property that requires prior notice and hearing or whether such decisions can be determined by the standardless and partial verdict of a popular vote.

B. The Election Process Is No Substitute for Notice and Hearing.

Procedural due process protections in the form of notice and hearing are vital as a safeguard against zoning restrictions which are ill-advised or unfair. Notice and hearing furnish an affected property owner an opportunity to persuade the responsible municipal body that any particular proposal, as applied to him, goes farther than necessary or works a peculiar injustice upon him. The election process is no substitute for a hearing because of the tremendous expense involved and because the decision making body, the electorate, is without expertise and is not required to be impartial.[11]

Proposition D, by its terms, provides for no exceptions to the thirty-foot height limitation on buildings within the "Coastal Zone." Therefore, any single affected property owner seeking an amendment to or variance from Proposition D would have to sponsor his own initiative proposition, and, under Section 23 of the City of San Diego Charter, this would require:

(1) Gathering the signatures of ten percent of the registered voters of the city at the last gen-

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[11] The inadequacies of the election process as a safeguard to insure rational exercise of the zoning power are described in *Taschner* v. *City Council*, 31 Cal. App. 3d 48, 64 (1973), a case relied upon by the dissent below (Appendix A, pp. A23-24):

> "It is urged that interested persons can suffer no substantial injury because the election process itself provides the equivalent safeguards afforded by state zoning law procedures. We are unpersuaded. The kind of public debate on the merits of the proposed zoning measure afforded by the election process, including the limited opportunity for the submission of written arguments to the voters, cannot be equated with a dispassionate study, evaluation and report upon the proposal by a staff of planning experts (§ 65804), notice and hearing before the planning commission (§ 65854), written recommendation by the planning commission with reasons for its recommendation (§ 65855), and notice and hearing before the legislative body (§ 65856) . . . . Moreover, the election offers the voters but a single choice, to accept or reject the proposal in its entirety. The legislative body, however, is empowered to modify (as well as approve or reject) a recommendation of the planning commission thereby enabling it to consider and take into account in its actions the legitimate claims and suggestions of those who would be affected by the proposal even though they may represent but a small segment of the electorate."

eral city election on a petition which states the amendment or variance sought; and

(2) Undertaking the enormous burden of persuading the majority of the hundreds of thousands of San Diego voters that he should be allowed to build in excess of thirty feet.

All of the evils and dangers pointed out in *Eubank* and *Roberge* are presented by the initiative process. In fact, to obtain relief from Proposition D, property owners must depend on an election the cost of which may well be prohibitive and the outcome of which turns on the arbitrary will of the majority of the voters, who may well be voting capriciously or without any standards other than their own taste or self interest.

CONCLUSION

The decision of the majority below conflicts with prior decisions of this Court and decisions of the highest courts of several states. The question presented is substantial and fundamental, going to the very nature of property ownership under the Constitution and potentially affecting the rights of all landowners.

For these reasons, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDICES

APPENDIX "A"

OPINION, CALIFORNIA SUPREME COURT

C O P Y No. 1

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

L.A. 30250 Super. Ct. No. 338110

[Filed December 26, 1974, Supreme Court.
G. E. Dishley, Clerk]

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION ET AL.,
Plaintiffs and Respondents,

v.

CITY COUNCIL OF THE CITY OF SAN DIEGO,
Defendant and Appellant.

In this case we must determine whether the voters of San Diego, and, more generally, the electors of any charter city in California, may validly enact a zoning ordinance through the initiative process. Plaintiffs, building contractor associations, contend that the provisions of both the San Diego City Charter and the "due process" clause of the federal Constitution preclude the city from adopting any zoning ordinance without affording all affected property owners "notice and hearing"; because the city's present initiative procedure contains no provision for such notice and hearing, plaintiffs assert that zoning ordinances cannot be adopted by initiative. Although the trial court agreed with plaintiffs and entered summary judgment in their favor we have concluded

SEE DISSENTING OPINION

that its decision was in error and, accordingly, we reverse.

As we explain, settled constitutional doctrine establishes that due process requires "notice and hearing" only in quasi-judicial or adjudicatory settings and not in the adoption of general legislation. Inasmuch as the zoning ordinance at issue here, establishing a uniform height limitation for buildings which may be erected along the city's coastline in the future, is unquestionably a general legislative act, the due process requirements of notice and hearing do not apply. Moreover, as we demonstrate, the provisions of the San Diego City Charter define the citizenry's fundamental right to initiate legislation in broad and generous terms and do not withhold the initiative power from zoning matters. Consequently, we conclude that citizens of San Diego may enact zoning ordinances by initiative and that the ordinance challenged in the instant case is valid.

In November 1972, the voters of the City of San Diego, a charter city, enacted an ordinance establishing a 30-foot height limitation for buildings which may be constructed within a prescribed coastal zone in the city.[1]

[1] The ordinance (No. 10896, submitted to the voters as Proposition D) provides: "Notwithstanding any section to the contrary, no building or addition to a building shall be constructed with a height in excess of thirty feet within the Coastal Zone of the City of San Diego. The words Coastal Zone, as used within this Ordinance, shall mean that land and water area of the City of San Diego from the northern city limits south to the border of the Republic of Mexico, extending seaward to the outer limit of city jurisdiction and extending inland to the location of Interstate 5 on January 1, 1971. This limitation shall not apply to that land area of the Coastal Zone bounded by National City on the south, San Diego Bay on the west and Laurel Street or the southwesterly projection of Laurel Street on the north.

"The base of measurement of the height shall be in accordance with the Uniform Building Code of 1970.

"Notwithstanding any section to the contrary, there shall be no exception to the provisions of this Ordinance."

The ordinance was adopted in accordance with the initiative procedure set forth in the San Diego City Charter and Elections Code, procedures authorized by article XI, section 5, of our state Constitution (In re Pfahler (1906) 150 Cal. 71; Martin v. Broderick (1897) 118 Cal. 474, 487.) All parties agree that the prescribed initiative procedures were complied with in full.

Subsequent to the adoption of the ordinance, plaintiffs instituted the present action challenging on various grounds the validity of the ordinance. After a hearing, the trial court granted plaintiffs' motion for summary judgment, concluding that both the provisions of the San Diego City Charter and the due process clause of the Fourteenth Amendment to the United States Constitution prohibit the enactment of a zoning ordinance through the initiative process; the court enjoined the city from enforcing the ordinance. The City of San Diego appeals from the decision.

1. *The provisions of the San Diego City Charter authorize the enactment of all ordinances, including zoning ordinances, through the initiative process.*

Plaintiffs initially contend that the San Diego City Charter itself precludes the enactment of a zoning ordinance by the initiative process. As we explain, we find this argument totally untenable.

Article III, section 11 of the San Diego City Charter vests all of the city's legislative powers in the city council "except such legislative powers as are reserved to the people by the Charter and the Constitution of the State. . . ." Article III, section 23 of the charter elaborates the people's reserved legislative powers, providing in broad terms: "The right to recall municipal officers and the powers of the initiative and referendum are hereby reserved to the people of the City. *Ordinances may be*

initiated; and referendum may be exercised on any ordinance passed by the Council except an ordinance which by the provisions of this charter takes effect immediately upon its passage; and any elective officer may be recalled from office." (Emphasis added.)

Through these provisions, the charter establishes the right of the people to initiate ordinances on all legislative matters. The charter makes no exception for "zoning ordinances," as distinguished from any other exercise of the police power, and past cases establish beyond question that a charter's broad grant of the initiative and referendum powers clearly applies to zoning measures. (See, e.g., Dwyer v. City Council (1927) 200 Cal. 505, 511-515; Bayless v. Limber (1972) 26 Cal.App.2d 463, 468-469; Fletcher v. Porter (1962) 203 Cal.App.2d 313, 322.)

Although nothing in the charter provisions dealing with the city's legislative powers in general, or with the initiative procedure in particular, provides the slightest indication that zoning measures were intended to be exempted from the initiative process, plaintiffs argue that a remote provision of the charter impliedly precludes the use of the initiative in such matters. Article V of the charter, entitled "Executive and Administrative Services," contains a provision, section 41(c), which provides in relevant part: "The City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws." State law prescribes certain minimum procedures, including notice and hearing, to be followed by planning commissions generally (see Gov. Code, §§ 65150, 65854), and since San Diego's current initiative process does not encompass such notice and hearing procedures, plaintiffs argue that section 41(c) impliedly precludes the use of the initiative in zoning matters.

This contention, however, completely overstates the reach of section 41(c). The subject of section 41(c) is the city planning commission, not the city council or the people of the city. The section does not purport to limit the power of the people in the exercise of the initiative power, nor does it prescribe any special legislative procedures to be followed by the city council in the area of zoning.[2] In short, the section simply governs the city planning commission's conduct of its affairs when that commission is authorized to act under the city charter; the section in no manner attempts to impinge on the people's initiative perogative.[3]

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[2] In this latter regard, section 41(c) pointedly does not refer to specific state zoning law provisions prescribing duties and powers for city councils. (See, e.g., Gov. Code, §§ 65850, 65856.) Government Code section 65803 states: "The provisions of this chapter [chapter 4: Zoning Regulations] shall not apply to a chartered city, except to the extent that the same may be adopted by charter or ordinance of the city" and thus it is clear that the state statutory provisions relating to city councils are not applicable.

In 1971, Government Code section 65804 was amended to prescribe minimal procedural standards for the conduct of zoning hearings by local planning *agencies*. Section 65804 purports to apply to chartered cities as well as general law cities and counties, and one amicus argues that the section requires notice and hearing before any zoning ordinance may be enacted by a charter city. We need not reach the serious state constitutional issue presented by the amicus' interpretation of the section (see Fletcher v. Porter, *supra*, 203 Cal. App.2d 313, 320-321) in this case, however, because the section by its terms only purports to set standards for hearings held by local planning *agencies* (i.e., administrative bodies (see Gov. Code, § 65100)) and does not purport to establish mandatory procedures to be followed before any zoning ordinance may be enacted.

[3] Moreover, even if section 41(c) could conceivably be viewed as creating an "implicit" conflict with the charter provisions relating to the initiative power, the authorities clearly indicate that the people's right to initiate legislation would take precedence. "[The] power of initiative must be liberally construed . . . to promote the democratice process." (Farley v. Healy (1967) 67 Cal.2d 325, 328; Blotter v. Farrell (1954) 42 Cal.2d 804, 809.)

Accordingly, we conclude that the San Diego City Charter authorizes the enactment of the challenged ordinance through the initiative process.

2. *Under the "due process" clause of the United States Constitution, general zoning legislation may be enacted without affording affected landowners "notice and hearing."*

Plaintiffs contend, however, that even if the adoption of zoning measures by initiative is permitted by the San Diego City Charter, as we have held, such procedure directly conflicts with the due process clause of the United States Constitution. Relying on statements in numerous recent decisions declaring that the "root requirement [of the due process clause is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest" (Boddie v. Connecticut (1971) 401 U.S. 371, 379 (fn. omitted); see Goldberg v. Kelly (1970) 397 U.S. 254; Sniadach v. Family Finance Corp. (1969) 395 U.S. 337), plaintiffs assert that because the challenged zoning ordinance significantly affects their real property rights, they had a constitutional right to "notice and hearing" before the zoning law was enacted. Since San Diego's initiative procedure does not afford to affected landowners such "notice and hearing," plaintiffs conclude that the enactment of the instant zoning ordinance violated their constitutional rights.

Plaintiffs' entire due process argument, however, is founded on an erroneous premise. From the inception of this nation's legal system, statutes of general application have regularly been enacted without affording each potentially affected individual notice and hearing. As we shall explain, it is black letter constitutional law that due process requires "notice and hearing" only in quasi-judicial or adjudicatory settings and not with respect to the adoption of general legislation. Since the

enactment of the instant general zoning ordinance through the initiative process was unquestionably a legislative, as distinguished from adjudicative, act, the constitutional requirements of "notice" and "hearing" do not apply.

Justice Oliver Wendell Holmes, writing for a unanimous United States Supreme Court in Bi-Metallic Co. v. Colorado (1915) 239 U.S. 441, 445, clearly articulated the due process principles that govern the instant case. Justice Holmes declared: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." California courts have uniformly adhered to the constitutional teaching of the *Bi-Metallic* decision, repeatedly reaffirming that "[t]here is no constitutional requirement for any hearing in a quasi-legislative proceeding." (Franchise Tax Board v. Superior Court (1950) 36 Cal.2d 538, 549; see, e.g., Beck v. City Council of Beverly Hills (1973) 30 Cal.App. 3d 112, 115; California Grape etc. League v. Industrial Welfare Com. (1969) 268 Cal.App.2d 692, 708-709.)

Plaintiffs, in relying upon the recent procedural due process decisions represented by Boddie v. Connecticut, *supra*, 401 U.S. 371 and similar cases, neglect the fundamental difference between such cases and the present matter; the decisions applying the due process requirement of notice and hearing have all involved governmental decisionmaking in an *adjudicative* setting, in which the government's action affecting an individual was deter-

mined by facts peculiar to the individual case;[4] the present matter, by contrast, involves the adoption of a broad, generally applicable, *legislative* rule. The seminal decisions of the United States Supreme Court clearly indicate that the due process requirements of notice and hearing are applicable only to governmental actions of an adjudicatory nature. In Mullane v. Central Hanover Tr. Co. (1950) 339 U.S. 306, 313, for example, Justice Jackson declared: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing appropriate to the nature of the case." (Emphasis added.) (See, e.g., Boddie v. Connecticut, *supra*, 401 U.S. 371, 377-378; Ownbey v. Morgan (1921) 256 U.S. 94, 110-111.)

The San Diego ordinance challenged in the instant action is unquestionably a general legislative act. We are thus not faced in the instant case with any of the great number of more limited "administrative" zoning decisions, such as the grant of a variance or the award of a conditional use permit, which are adjudicatory in nature[5]

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[4] Thus, for example, Morrissey v. Brewer (1972) 408 U.S. 471 involved a governmental determination as to the revocation of an individual's parole status, Goldberg v. Kelly, *supra*, 397 U.S. 254 concerned a decision as to the termination of an individual recipient's welfare grant, Bell v. Burson (1971) 402 U.S. 535 addressed a proceeding adjudicating the revocation of an individual's driver's license and Sniadach v. Family Finance Corp., *supra*, 395 U.S. 337 involved the garnishment of an individual debtor's wages. None of the decisions involved governmental enactment of a general legislative rule.

[5] "It is long settled law that the enactment of a zoning ordinance is purely a legislative act. . . . It is to be distinguished from the granting or denial of a variance, a conditional use permit or an exception to use, all of which call for administrative action. . . ." (Tandy v. City of Oakland (1962) 208 Cal.App.2d 609, 611; see, e.g., Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 517 (grant of variance a quasi-judicial, administrative act); Johnston v. City of Claremont (1958) 49 Cal.2d 826, 834 (grant of use permit an administrative act); Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 74 (same).)

and which thus involve entirely different constitutional considerations. Instead we review the enactment of legislation of the classic mold, establishing a broad, generally applicable rule of conduct on the basis of a general public policy. Under the established constitutional principle noted above, notice and hearing have never been constitutional prerequisites for the adoption of such a legislative enactment. (See generally 1 Davis, Administrative Law (1958) §§ 7.04, 7.06, pp. 420-426, 429-432. See also United States v. Florida East Coast R. Co. (1973) 410 U.S. 224, 244-245.)

Plaintiffs contend, however, that there is an exception to this established constitutional principle in the case of "zoning" legislation; they urge that zoning measures, unlike all other legislation, can only be adopted after notice and hearing to all affected landowners. The justification for this asserted exception appears to be that zoning measures frequently have a substantial impact on real property values. This characteristic of zoning measures, however, does not warrant differential treatment for a number of reasons.

In the first place, although zoning measures frequently do significantly affect real property values, this attribute does not distinguish such measures from a host of other legislative enactments which may have an equally important impact on those values. For example, legislative decisions as to the location of public improvements, the standards of building and health and safety codes, or the level of property tax rates all have considerable direct effect on land values; moreover, even such basic legislative policy decisions as the level of educational expenditures may have substantial indirect effect on prop-

erty values. Plaintiffs suggest no reasons why zoning measures should invoke different constitutional procedures than any of these other legislative matters.

Second, and even more fundamentally, plaintiffs fail to explain why legislation which has a significant impact on real property rights and real property values should be differentiated from legislation which significantly affects other rights or other values. The due process clause of our federal Constitution applies uniformly to deprivations of "*life, liberty or property,*" and the time has long past when property rights were exalted over our citizens' rights in life or liberty. Legislative enactments are continually adopted which significantly affect individuals' "life or liberty"; trades and professions are subjected for the public good to complex regulations limiting the liberty to engage in such occupations, and sharp business practices are continually regulated through criminal status. If such legislative measures can be enacted without affording affected individuals notice and hearing, as plaintiffs concede, plaintiffs cannot reasonably contend that notice and hearing are constitutional prerequisites for zoning legislation.

Indeed, the authoritative decisions of the United States Supreme Court clearly demonstrate that the constitutional principle permitting the enactment of legislation without notice and hearing is as applicable to legislation affecting the value of real property as to any other legislation. The *Bi-Metallic* decision itself, for example, involved a landowner's challenge to an order of the State Board of Equalization increasing the valuation of all taxable property in the City of Denver by 40 percent. Such an increase, of course, unquestionably significantly affected property values in Denver, and plaintiff postulated the invalidity of the order on the failure to afford him an opportunity to be heard prior to its adoption. Justice Holmes, writing for a unanimous court, rejected the

landowner's contention in no uncertain terms: "The question . . . is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned—here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county. . . . *The answer of this court in the State Railroad Cases* [(1875)] *92 U.S. 575 . . . was that it was hard to believe that the proposition was seriously made.*" (Emphasis added.) (239 U.S. at p. 445.)

Moreover, in rejecting out-of-hand the plaintiff's contention that a quasi-legislative order of an administrative board was void for lack of notice or hearing, the *Bi-Metallic* court indicated that it was *even clearer* that an actual legislative act could be adopted without such notice or hearing, even if such legislation seriously affected property rights. Justice Holmes wrote: "General statutes within the state powers are passed that affect the person *or property* of individuals, *sometimes to the point of ruin*, without giving them a chance to be heard. . . . If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, *no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it. . . .*" (Emphasis added.) (239 U.S. at p. 445.)

The teaching of *Bi-Metallic* was reaffirmed in Bowles v. Willingham (1944) 321 U.S. 503, a case involving the validity of a rent control statute. In *Bowles* a federal law authorizing the Director of the Office of Price Administration to establish maximum permissible rents was challenged, inter alia, on procedural due process grounds. Plaintiff landlords claimed that the act was unconstitutional because it permitted the adoption of a maximum rent schedule, inevitably affecting the value of their property, without affording them notice and hearing. The

Bowles court, noting the quasi-legislative nature of the administrative rent schedule, rejected the plaintiffs' due process contention and, as in *Bi-Metallic*, cited the enactment of legislation as an a fortiori illustration of a situation in which there is no constitutional requirement of notice or hearing. The *Bowles* court stated in this regard: "Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents [itself] on a national basis the same as it did for the District of Columbia. See 55 Stat. 788." (321 U.S. at 519.)

Ignoring these governing constitutional decisions, plaintiffs cite a string of California cases which they contend establish the constitutional principle that notice and hearing are required before zoning legislation may be enacted. Upon analysis, however, it is clear that the cited cases are not authoritative precedent for plaintiffs' contention.

Hurst v. City of Burlingame (1929) 207 Cal. 134 is the seminal decision in the line of cases relied upon by plaintiffs. In *Hurst*, the electors of the City of Burlingame, a general law city, enacted a comprehensive zoning ordinance pursuant to the initiative procedure established by state statute. (See Cal. Const., art. IV, § 25.) Plaintiff in *Hurst* contended that the measure was invalid because it had been adopted without compliance with the procedural requirements of notice and hearing contained in the state Zoning Act; plaintiff argued that since the city's entire power to enact a zoning ordinance stemmed from the grant of authority contained in the Zoning Act, any zoning ordinance which the city adopted had to be enacted pursuant to the mandatory procedures established by the act.

The *Hurst* court, applying the general rule that the initiative power is coextensive with the general legislative authority of a government entity, agreed with plaintiff

and held that since the city's legislators could not enact a zoning ordinance without complying with the Zoning Act's procedural requirements, the voters had no power to circumvent the statutory procedures through the initiative process. The court concluded that the state Zoning Act, constituting a specific statute directed to the procedure for enacting zoning measures, took precedence over the more general initiative statute.

Thus, the *Hurst* decision rests exclusively on a matter of statutory interpretation; its holding does not rely on constitutional principles at all. One possibly ambiguous passage of the *Hurst* decision, however, sowed the seeds of plaintiffs' present confusion. That passage of *Hurst*, located in the middle of the opinion's statutory analysis, reads as follows: "When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes *quasi* judicial in character and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with." (207 Cal. at p. 141.) This passage, however, states only that notice and a hearing are necessary *when required by statute* and implicitly supports the constitutional principle reviewed above by suggesting rather clearly that when there is no such statutory requirement the adoption of a general zoning law remains a legislative act, as to which due process does not require notice and hearing. Because the instant case involves the adoption of a zoning ordinance by a charter city, to which the state Zoning Act does not apply (see Gov. Code, § 65803), the *Hurst* decision lends no support to plaintiffs' position.

Although, when closely analyzed, it is clear that *Hurst* neither held nor implied that in the absence of an applicable statute due process requires notice and hearing before zoning legislation may be enacted, a few subse-

quent cases have misconstrued the carefully limited language of *Hurst* as articulating the broad, constitutional rule advocated by plaintiffs. The one distinctive feature of these few decisions, however, is that in every case the erroneously broad rendition of *Hurst's* holding has been pure dictum.[6] To the extent that such statements are inconsistent with our present opinion they are disapproved.

Plaintiffs also rely heavily on this court's recent decision in Scott v. City of Indian Wells (1972) 6 Cal.3d 541, but that decision is entirely inapposite to the instant matter. In *Scott*, the zoning matter at issue did not involve the enactment of a general legislative zoning ordinance, as here, but instead an administrative determination by a local planning commission on an application for a conditional use permit for a particular

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[6] In City of Escondido v. Desert Outdoor Advertising, Inc. (1973) 8 Cal.3d 785, 790, for example, we held that the plaintiff-general law city's anti-billboard ordinance was a valid enactment which did not fall within the aegis of the state Zoning Act, and then gratuitously suggested in dictum, citing *Hurst*, that in zoning matters the statutory procedures were constitutionally required. And in Gilgert v. Stockton Port District (1936) 7 Cal.2d 384, 391, our court held that because the Legislature had not authorized the district to enact zoning laws, the district possessed no such authority; the *Gilgert* court buttressed this holding by suggesting in dictum that the lack of a notice or hearing mechanism also precluded the district from creating such zones.

The *Gilgert* dictum was based in large measure upon similar dictum in the earlier Court of Appeal decision of Berrata v. Sales (1927) 82 Cal.App. 324, 327, which suggested that due process requires "notice" in these circumstances only after first holding that notice was actually required by an applicable statute. Indeed, almost all of the decisions—both in California and from our sister states—relied upon by plaintiffs follow the pattern of the *Berrata* decision; the decision in each of these cases has been based specifically on an applicable statute and discussion of constitutional requirements has been pure dictum. (See Taschner v. City Council (1973) 31 Cal.App.3d 48; People's Lobby, Inc. v. Board of Supervisors (1973) 30 Cal.App.3d 869; cf. Cugini v. Chiaradio (1963) 96 R.I. 120 [189 A.2d 798]; Hart v. Bayless Investment & Trading Co. (1959) 86 Ariz. 379 [346 P.2d 1101].)

parcel of land. Because of the administrative, adjudicatory nature of the use permit procedure at issue in *Scott* (see fn. 5, *supra*), both statutory and constitutional provisions called for notice and hearing; the only issue in the case turned on whether the city could give such notice and hearing to adjoining landowners who resided within the city, but deny such notice and hearing to similarly affected adjoining landowners who lived outside the city boundaries. We held in *Scott* that "the City of Indian Wells owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents. . . ." (6 Cal.3d at p. 549.)

The *Scott* decision provides absolutely no authority for plaintiffs' contention that due process requires notice and hearing before a legislative zoning ordinance may be adopted; indeed, *Scott* explicitly recognizes that the due process requirements of notice and hearing adhere only in adjudicative settings, such as the grant of a conditional use permit presented by the facts of that case. In summarizing the applicable constitutional principles, the *Scott* court declared: "[T]he due process clause of the Fourteenth Amendment requires 'at a minimum . . . that deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing. . . .' [Citation]." (Emphasis added.) (6 Cal.3d at p. 549, quoting Mullane v. Central Hanover Tr. Co., *supra*, 339 U.S. at p. 313.)

Thus, plaintiffs' due process contention is not supported by past California decisions. Indeed, the very contrary obtains. All of the California authorities which have directly faced the constitutional issue posed by the instant case have uniformly concluded that zoning legislation, as all other legislation, may constitutionally be enacted without affording all affected individuals notice and hearing. (See Duran v. Cassidy (1972) 28 Cal. App.3d 574, 583-586; Bayless v. Limber, *supra*, 26 Cal.

App.3d 463, 469-470; cf. Dwyer v. City Council, *supra*, 200 Cal. 505, 516; Adler v. City Council (1960) 184 Cal.App.2d 763, 777-778.) For the reasons reviewed above, we reaffirm this established line of authority.

In sum, we conclude that neither the Constitution nor the San Diego City Charter precludes the people of San Diego from enacting a general zoning ordinance through the initiative process.

The judgment is reversed.

TOBRINER, J.

WE CONCUR:

WRIGHT, C. J.
SULLIVAN, J.
FILES, J.*

* Assigned by the Chairman of the Judicial Council.

C O P Y No. 1

L.A. 30250

SAN DIEGO BLDG. CONTRACTORS ASSOC.

v.

CITY COUNCIL OF SAN DIEGO

DISSENTING OPINION BY BURKE, J.

I dissent. This case concerns the important question whether municipal zoning ordinances and other measures substantially affecting or restricting land use properly may be enacted through the initiative process, without providing affected property owners with the traditional due process safeguards of notice and hearing. I would hold that the initiative process as presently designed affords constitutionally inadequate protection to property owners, and that the essential demands of due process of law under the state and federal Constitutions may be satisfied only by a zoning procedure which incorporates some provision for notice and hearing in addition to the minimum opportunities available under the initiative election process itself.

It has long been the rule in this state that, *as to general law cities or counties*, the initiative process does not provide an adequate substitute for compliance with the state zoning law (Gov. Code, § 65800 et seq.), and particularly those provisions prescribing the requisite notice and hearing to be afforded to affected property owners. (Hurst v. City of Burlingame, 207 Cal. 134; Johnston v. City of Claremont, 49 Cal.2d 826, 837; Laguna Beach Taxpayers' Assn. v. City Council, 187 Cal. App.2d 412, 415; People's Lobby, Inc. v. Board of Supervisors, 30 Cal.App.3d 869, 872-873; Taschner v. City Council, 31 Cal.App.3d 48, 61-64.)

The preceding cases are based in part on the premise that general law cities and counties are governed by the provisions of the state zoning laws, which laws take precedence over the more general scope of initiative legislation. As stated in Hurst v. City of Burlingame, *supra*, 207 Cal. 134, 141, "The initiative law and the zoning law are hopelessly inconsistent and in conflict as to the manner of the preparation and adoption of a zoning ordinance. The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope."

The majority herein take the position that the rule of the foregoing cases does not apply to *charter* cities or counties which are not bound by the provisions of the state zoning laws.[1] Indeed, this position finds some support in the cases. (See Fletcher v. Porter, 203 Cal.App. 2d 313, 320-323; Bayless v. Limber, 26 Cal.App.3d 463, 469; Duran v. Cassidy, 28 Cal.App.3d 574, 583-585.) As stated in *Bayless* (p. 469), distinguishing Hurst v. City of Burlingame, *supra*, 207 Cal. 134, and Laguna Beach Taxpayers' Assn. v. City Council, *supra*, 187 Cal.App.2d 412, ". . . respondents overlook the decisive fact that these cases involved general law cities while this case is concerned with a chartered city. In those cases it was held that zoning may not be done by initiative because the procedure leading to the enactment of an initiative ordinance is incompatible with that prescribed by statute

[1] Government Code section 65803 provides that the provisions of the zoning laws shall not apply to a charter city except to the extent those laws may be adopted by charter or ordinance. Note, however, section 65804 (as amended in 1971), which specifies that even as to *charter* cities zoning agencies must develop rules of procedure for conducting public hearings "so that all interested parties shall have advance knowledge of procedures to be followed." The section also provides that a record of the hearing must be made, if requested. The section thus assumes, but does not expressly require, that charter cities will hold hearings on zoning measures.

for the enactment of zoning ordinances by a city council. . . . But the manner of enacting municipal ordinances is a municipal affair and, as previously indicated, the charter of a chartered city, rather than state statutes, govern municipal affairs within such a city. [Citation.] Moreover, ordinarily, there can be no implied limitations upon chartered powers concerning municipal affairs. [Citation.]"

In my view, the *Bayless* decision, *supra*, was premised upon the incorrect assumption that statutory provision for notice and hearing in zoning matters is a matter of legislative policy, rather than constitutional mandate. The majority seem to concede that if notice and hearing are essential elements of due process of law, even charter cities are powerless to ignore them. I turn then to an analysis of the question whether constitutional principles require some provision for notice and hearing before zoning measures may be adopted. Subsequently, I discuss whether the initiative process itself furnishes sufficient protection to affected property owners so that applicable constitutional principles are satisfied.

1. *Due Process and the Zoning Laws*

This court has frequently recognized that "the most fundamental ingredient of the 'due process' guaranteed by our state Constitution is 'a meaningful opportunity to be heard.'" (Randone v. Appellate Department, 5 Cal. 3d 536, 550, and cases cited.) On the other hand, we have acknowledged that "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, all are considerations which must be taken

into account." (In re Tucker, 5 Cal.3d 171, 179, quoting from Hannah v. Larche, 363 U.S. 420, 442; see Sokol v. Public Utilities Commission, 65 Cal.2d 247, 254.)

Ordinarily, as the majority explain, if a proceeding is "legislative" rather than "adjudicative" in character, a hearing of a judicial type is not required by the Constitution. (Franchise Tax Board v. Superior Court, 36 Cal.2d 538, 549; see United States v. Florida East Coast R. Co., 410 U.S. 224, 244-246; Bi-Metallic Co. v. Colorado, 239 U.S. 441, 445.) Although enactment of a zoning ordinance, contrasted with a grant of an easement or variance, may be characterized as a "legislative" act, nevertheless "A zoning ordinance can and does have a more direct and lasting effect upon property values and property owners within a city than almost any other type of ordinance. What is done with respect to one piece of property of necessity has an effect, good or bad, upon adjacent or nearby property." (Johnston v. City of Claremont, *supra*, 49 Cal.2d 826, 837.)

Accordingly, our cases have long recognized the constitutional right of affected property owners to notice and hearing before a municipality may enact zoning ordinances which substantially restrict the use or otherwise substantially impair the value, of their property. (City of Escondido v. Desert Outdoor Advertising, Inc., 8 Cal.3d 786, 790; Scott v. City of Indian Wells, 6 Cal.3d 541, 549; Gilgert v. Stockton Port District, 7 Cal.2d 384, 391; Berrata v. Sales, 82 Cal.App. 324, 327; see Anderson, American Law of Zoning, § 4.03, p. 159, § 4.11, pp. 168-169; McQuillan, Municipal Corporations, § 25.261, pp. 212-213; Annot., 96 A.L.R.2d 449, 453, fn. 5.)[2]

[2] For cases from other states setting forth this principle, see Bell v. Stoddard (Ga.), 141 S.E.2d 536, 539; Cugini v. Chiaradio (R.I.), 189 A.2d 798; Hart v. Bayless Investment & Trading Company (Ariz.), 346 P.2d 1101; Vandervort v. Sisters of Mercy of Cincinnati (Ohio), 117 N.E.2d 51.

For example, we have recently stated that "Zoning does not deprive an adjacent landowner of his property, but it is clear that the individual's interest in his property is often affected by local land use controls, and the 'root requirement' of the due process clause is 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid government interest . . . justifies postponing the hearing until after the event. . . .' [Citations.]" (Scott v. City of Indian Wells, *supra*, 6 Cal.3d 541, 549.) We held in *Scott* that principles of due process of law required a city to provide notice and a hearing to nonresident adjacent landowners whose property would be affected by municipal zoning measures.[3] Thus, it would appear firmly established in our jurisprudence that the adoption of zoning measures which involve substantial deprivations of property may not take place in the absence of constitutionally adequate provision for prior notice and hearing. I consider, then, the question whether the initiative process affords adequate due process safeguards.

2. *Due Process and Zoning by Initiative*

Contrary to the majority's position herein, a number of cases have suggested that since the initiative process fails to afford adequate notice and hearing for affected property owners, it may not be constitutionally employed to adopt zoning measures which substantially affect the use of their land. (People's Lobby, Inc. v. Board of Supervisors, *supra*, 30 Cal.App.3d 869, 873-874; Taschner v. City council, *supra*, 31 Cal.App.3d 48, 65-69; see Hurst

[3] To the same effect is Gilgert v. Stockton Port District, *supra*, 7 Cal.2d 384, 391, wherein we stated that "Zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might otherwise be put, but before the owner may then be deprived of his property and the enjoyment thereof he is entitled to adequate notice and a hearing thereon."

v. City of Burlingame, *supra*, 207 Cal. 134, 141; Johnston v. City of Claremont, *supra*, 49 Cal.2d 826, 836-837; Chase v. Kalber, 28 Cal.App. 561, 573-574; McQuillin, *supra*, § 25.246, p. 168; City of Scottsdale v. Superior Court (Ariz.), 439 P.2d 290, 293-294; Elliott v. City of Clawson (Mich.), 175 N.W.2d 821, 828; Smith v. Township of Livingston (N.J.), 256 A.2d 85, affd. 257 A.2d 698; but see Bayless v. Limber, *supra*, 26 Cal.App.3d 463, 469-470; Duran v. Cassidy, *supra*, 28 Cal.App.3d 574, 585-586.)

As indicated above, the Court of Appeals in Bayless v. Limber, *supra*, 26 Cal.App.3d 463, 469-470, concluded that no denial of constitutional due process occurs when a charter city enacts a zoning ordinance by the initiative process. The court reasoned that "Due process in law-making is not the same as due process in the adjudication of controversies. [Citations.] Generally speaking, a hearing on a legislative matter is held for the purpose of informing the law makers regarding relevant facts and policy considerations; it is not held for the protection of individual rights, property or otherwise. [Citation.] . . . The electoral process itself normally provides both notice and an opportunity to be heard to all electors, by written arguments (see Elec. Code, § 4017) and otherwise. In our view neither the United States Constitution nor the California Constitution requires more. [Citations.]" The *Duran* case adopted *Bayless*' reasoning in this regard.

Yet as we have seen, prior cases of this court and the Courts of Appeal have established beyond reasonable dispute that the area of zoning is in a class by itself and presents real and tangible risks of deprivation of private property far beyond those involved in ordinary "legislative" measures. To protect the constitutional rights of the property owner the courts heretofore have insisted upon traditional due process safeguards of notice

and hearing, safeguards which perform a function far beyond the simple one of "informing the lawmakers regarding relevant facts."[4] Thus, we necessarily must reach the ultimate question whether in fact the initiative process does provide constitutionally adequate notice and hearing, as was assumed in *Bayless* and *Duran*.

In my view the Court of Appeal in Taschner v. City Council, *supra*, 31 Cal.App.3d 48, correctly set forth the flaws in the *Bayless/Duran* analysis. In *Taschner*, the court explained at length the deficiencies of the initiative process when compared with the procedural safeguards specified in the state zoning laws (Gov. Code, § 65800 et seq.). As stated in *Taschner* (p. 64), "It is urged that interested persons can suffer no substantial injury because the election process itself provides the equivalent safeguards afforded by state zoning law procedures. We are unpersuaded. The kind of public debate on the merits of a proposed zoning measure afforded by the election process, including the limited opportunity for the submission of written arguments to the voters, cannot be equated with a dispassionate study, evaluation and report upon the proposal by a staff of planning experts (§ 65804), notice and hearing before the planning commission (§ 65854), written recommendation by the planning commission with reasons for its recommendation (§ 65855), and notice and hearing before the legislative body (§ 65856). Furthermore, it is common knowldege that election campaigns cost money and that the extent to which one may be heard in an election too often depends on the size of one's pocketbook whereas planning commissions and legislative bodies are required by law to afford all interested persons a full and fair hearing on the merits of their respective claims. Moreover, the

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[4] Contrary to *Bayless*' assumption that zoning hearings are held to inform the lawmakers, it is widely acknowledged that such hearings serve the independent purpose of affording property owners an opportunity to be heard. (Anderson, *supra*, § 4.11, p. 168.)

election offers the voters but a single choice, to accept or reject the proposal in its entirety. The legislative body, however, is empowered to modify (as well as approve or reject) a recommendation of the planning commission thereby enabling it to consider and take into account in its actions the legitimate claims and suggestions of those who would be affected by the proposal even though they may represent but a small segment of the electorate."

The court concluded, consistent with the views I have expressed above, that some provision for notice and hearing comparable with the provisions of the state zoning laws is required as a matter of constitutional due process, at least whenever the zoning measure substantially affects land use.[5]

Thus, contrary to the statement in *Bayless* that the initiative election process affords adequate opportunity for notice and hearing, it is evident that in its present operation the initiative process fails to afford that degree of protection necessary to satisfy due process requirements under the state and federal Constitutions.[6] I do not, of course, suggest that it would be impossible to modify the initiative process in such a manner as to

[5] See also People's Lobby, Inc. v. Board of Supervisors, *supra*, 30 Cal.App.3d 869, 873, pointing out that, as a practical matter, "Zoning proposals should have the benefit of public hearings and professional study by the local government's planning staff so as to integrate the proposal with the other zoning ordinances and particularly the city or county land use master plan. Overall planning would be seriously crippled if the initiative process could be used in this field." See generally, Comment, 10 Cal.West.L.Rev. 105, discussing the legal and practical problems in zoning by initiative.

[6] By comparison, it has been held that the *referendum* process passes constitutional muster in this regard since the referendum election occurs *after* the adoption of the ordinance to be voted upon, and *after* the property owner has had his notice and hearing. (See Johnston v. City of Claremont, *supra*, 49 Cal.2d 826, 836-837; Hurst v. City of Burlingame, *supra*, 207 Cal. 134, 140; Dwyer v. City Council, 200 Cal. 505, 516; Taschner v. City Council, *supra*, 31 Cal.App.3d 48, 62, fn. 10.)

provide adequate due process safeguards. The Legislature or the governing boards of local public entities might well develop an approach which strikes a proper balance between the rights of the affected property owners and the interests of the public in reserving the power to initiate legislation.[7]

In the instant case, however, it is apparent that the coastal zone initiative was adopted without providing plaintiffs and others similarly affected an adequate opportunity to be heard. San Diego's new building height restriction is undoubtedly a zoning measure [8] which could substantially affect plaintiffs' use of their land, and substantially decrease its value. (See Taschner v. City Council, *supra*, 31 Cal.App.3d 48, 60, involving a similar building height restriction.)

I would affirm the judgment.

WE CONCUR: BURKE, J.*

McCOMB, J.
CLARK, J.

[7] See Comment, *supra*, 10 Cal.West.L.Rev. at pages 128-130, setting forth the author's recommended amendment to the state zoning law to permit zoning by initiative with provision for a modification hearing by the governing body after the initiative measure is adopted. See also Hurst v. City of Burlingame, *supra*, 207 Cal. 134, 141.

[8] I would leave open for further case development the precise definition of "zoning" under the rule I propose herein. For cases discussing the question whether a particular measure is a zoning measure requiring notice and hearing, see Taschner v. City Council, *supra*, 31 Cal.App.3d 48, 68-69; Fletcher v. Porter, *supra*, 203 Cal. App.2d 313, 324-325; Laguna Beach Taxpayers' Assn. v. City Council, *supra*, 187 Cal.App.2d 412. See also South Gwinnett Venture v. Pruitt (5th Cir.) 482 F.2d 389, distinguishing between a general zoning measure affecting the entire community and a more specific measure affecting a particular tract of land or disposing of a single petition for relief.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX "B"

OPINION, FOURTH DISTRICT COURT OF APPEAL, DIVISION ONE

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

4 Civ. No. 12607 (Sup. Ct. No. 338110)

[Filed Nov. 16, 1973, Court of Appeal—Fourth Dist.
John R. McDowell, Clerk, E. Peterson, Deputy Clerk]

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION, ET AL.,
Plaintiffs and Respondents,

v.

CITY COUNCIL OF THE CITY OF SAN DIEGO,
Defendant and Appellant.

OPINION

APPEAL from a judgment of the Superior Court of San Diego County. Louis M. Welsh, Judge. Reversed.

John W. Witt, City Attorney, and Thomas F. Calverley, Deputy City Attorney, for Appellant.

Webb, Welles, Issac & Freedman and James R. Webb as Amicus Curiae on behalf of Appellant.

White, Price, Peterson & Robinson and Paul A. Peterson and James B. Mehalick, for Respondents.

This appeal by the City of San Diego involves the validity of a chartered city's zoning ordinance adopted by the initiative process. The ordinance provides the

height of buildings to be constructed within a prescribed coastal zone of the City of San Diego shall not exceed 30 feet.[1] On November 7, 1972, a majority of the electors voted for adoption of the ordinance.

The trial court granted the respondents' motion for summary judgment addressed to the first and third of six causes of action alleged in their complaint for a declaratory judgment and injunctive relief filed December 1, 1972. The complaint alleges respondents, San Diego Building Contractors Association and Associated General Contractors of America, are California nonprofit corporations whose memberships are composed of organizations and individuals engaged in or otherwise interested in the construction of buildings and improvements on real property in San Diego. They allege some of the property is at present legally zoned for buildings which may have a height in excess of 30 feet and the property owners are assessed for and liable to pay taxes on the land. They also allege their property or that of their members is located within the zone described in the ordinance.

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[1] The ordinance (No. 10896, submitted to voters as Proposition D) reads:

"Notwithstanding any section to the contrary, no building or addition to a building shall be constructed with a height in excess of thirty feet within the Coastal Zone of the City of San Diego. The words Coastal Zone, as used within this Ordinance, shall mean that land and water area of the City of San Diego from the northern city limits south to the border of the Republic of Mexico, extending seaward to the outer limit of city jurisdiction and extending inland to the location of Interstate 5 on January 1, 1971. This limitation shall not apply to that land area of the Coastal Zone bounded by National City on the south, San Diego Bay on the west and Laurel Street or the southwesterly projection of Laurel Street on the north.

"The base of measurement of the height shall be in accordance with the Uniform Building Code of 1970.

"Notwithstanding any section to the contrary, there shall be no exception to the provisions of this Ordinance."

The first cause of action, seeking declaratory relief, challenges the validity of the ordinance on the basis the Charter of the City of San Diego does not permit the use of the initiative process to enact a zoning ordinance. The second cause of action, seeking declaratory relief, incorporates the allegations of the first cause [2] and alleges the initiative ordinance is unconstitutional because it attempts to regulate in a field occupied by state law and is in conflict with the state law. The third cause of action alleges facts concerning adopting and enforcing the ordinance causing the expenditure of public tax monies and giving rise to the need for injunctive relief. The fourth and fifth causes of action seek injunctive relief alleging, respectively, the adoption and enforcement of the zoning ordinance by the City Council will deny respondents the use of their property without due process, and the ordinance violates guarantees of equal protection. The sixth cause of action alleges the ordinance is overbroad in scope and violates the Fourteenth Amendment.

After argument on the motion for summary judgment the trial court, on January 29, 1973, ordered the city's answer to the first and third causes of action stricken and judgment for respondents on those causes entered as follows:

"I

> "The initiative zoning ordinance set forth in Exhibit A to plaintiffs' complaint is void as an initiative measure and has no force or effect as law because (1) it was enacted by the initiative process and mandatory procedures for hearings held by the Planning Commission and the City Council required by the City Charter of San Diego and the Government Code were not followed, and (2) the failure to hold such hearings has deprived plaintiffs of that due process

[2] Each following cause of action incorporates the allegations of all the causes preceding it.

> of law guaranteed by the Fourteenth Amendment to the United States Constitution.
>
> "II
>
> "The City of San Diego has no right or authority to take any actions to treat or enforce said initiative zoning ordinance. Defendant and each and all of its attorneys, agents, servants and employees and all other persons acting in concert or participation with it, or with actual or constructive notice of such a decree are hereby permanently enjoined from declaring the purported initiative zoning ordinance adopted or enacted as a city ordinance, from taking any actions to enforce or implement the same, and from expending any public funds in connection with the above-mentioned action." [3]

An important point not raised by the parties relates to the rule contained in Code of Civil Procedure section 437c that no judgment shall be entered prior to the termination of the action. Since the order on the motion for summary judgment pertains to only two of the six causes of action pleaded, it is, when viewed strictly as a summary judgment proceeding, a partial order which is nonappealable (*King v. State of California*, 11 Cal. App. 3d 307, 310; *Lopes* v *Capital Co.*, 192 Cal. App. 2d 759, 762).

The breadth of the order declaring the ordinance void and of no force or effect, however, makes determination of the remaining causes of action unnecessary for it affords respondents the essential relief they seek in the complaint. Additionally, the "motion for summary judgment" proceedings in this case clearly show the parties had no factual issues to tender the court and sought only a determination of the purely legal question of the

[3] After the city filed a petition for a writ of supersedeas, on March 14, 1973 we ordered enforcement of the judgment stayed until further order of this court.

ordinance's constitutional validity. Under these circumstances we view the order entered January 29, 1973, as in the nature of a judgment on the pleadings from which an appeal lies. (See *Jones-Hamilton Co.* v. *Franchise Tax Bd.*, 268 Cal. App. 2d 343, 347; 4 Witkin, Cal. Procedure, 2d Ed., Proceedings Without Trial, § 177, pp. 2829-2830.)[4]

The merits of the case involve two issues: (1) Does the San Diego City Charter require use of the means prescribed by general law to enact a zoning ordinance and thus preclude the people from using the initiative process to adopt the ordinance as is the case in a general law city;[5] and (2) if not, does the use of the initiative process to adopt the ordinance violate guarantees of due process of law and make the ordinance invalid? We answer each question in the negative.

Initially, as pointed out in *Bayless* v. *Limber*, 26 Cal. App. 3d 463, at pages 467 and 468, under article 1, section 2 of the California Constitution, "All political power is inherent in the people" and under article 4, section 1 of the same document, "The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum." In the case of a charter city

[4] Declarations and memoranda of points and authorities relating to the motion were filed after the city answered the complaint on December 18, 1972. The case was thus at issue for purposes of using a motion for a judgment on the pleadings.

[5] In a general law city the cases repeatedly hold the initiative process cannot be used to enact a zoning ordinance. The reasons are: (1) the general law embodied in the state zoning law (Ch. 4 (§ 65800 et seq.) Title 7, Gov. Code) prescribes the method for enactment of zoning ordinances; (2) this mode is the measure of the power of general law cities to legislate on zoning matters; and (3) the state zoning law method does not include the initiative process (*Hurst* v. *City of Burlingame*, 207 Cal. 134, 140-141; *Laguna Beach Taxpayers' Assn.* v. *City Council*, 187 Cal. App. 2d 412, 414-415; *Taschner* v. *City Council*, 31 Cal. App. 3d, 48, 58, 61).

dealing with municipal affairs, however, the legislative power is divided between the City Council on the one hand and the electors on the other. (See Cal. Const., art. 11, § 3, and art. 4, § 25: *Dwyer* v. *City Council*, 200 Cal. 505, 513; *Lawing* v. *Faull*, 227 Cal. App. 2d 23, 29.)

Subject only to constitutional limitations and preemptive state law, the charter of the city is the supreme law. (See Cal. Const., art. 11, § 3, subd. (a), and § 5, subd. (a); *Harman* v. *City and County of San Francisco*, 7 Cal. 3d 150, 161.)

The initiative power extends to *all* municipal legislation. (*Hopping* v. *Council of City of Richmond*, 170 Cal. 605, 609-610; *Dwyer* v. *City Council*, *supra*, 200 Cal. 505, 511.) Included in such legislation are zoning ordinances which represent an exercise of the police power granted cities by California Constitution, article 11, section 7. (*Lockard* v. *City of Los Angeles*, 33 Cal. 2d 453, 460; *Dwyer* v. *City Council*, *supra*, 200 Cal. 505, 511-512.)

The initiative power reserved to the people of a city by its charter must be liberally construed. (*Farley* v. *Healey*, 67 Cal. 2d 325, 328.) It is the duty of the courts to guard jealously this power of the people. (*Martin* v. *Smith*, 176 Cal. App. 2d 115, 117.)

Article III of the San Diego City Charter vests all of the city's legislative powers, "except such legislative powers as are reserved to the people by the Charter, and the Constitution of the State," in the City Council, "subject to the terms of this Charter and of the Constitution of the State of California." (§ 11, art. III, San Diego City Charter.) Section 23, also contained in article III relating to legislative power, provides in part:

> "The right to recall municipal officers and the powers of the initiative and referendum are hereby reserved to the people of the City. Ordinances may be initi-

ated. . . . The Council shall include in the election code ordinance . . . an expeditious and complete procedure for the exercise by the people of the initiative, referendum and recall, including forms of petitions; provided that the number of signatures necessary on petitions for the initiation of an ordinance for the consideration of the Council shall be three per cent of the registered voters of the City at the last general City election; that for the direct submission of a measure to the people it shall require a petition signed by ten per cent of the registered voters of the City at the last general City election . . . ."

The City Council has complied with the charter mandate to adopt an election code ordinance and establish procedures for the exercise of the initiative. (See San Diego City Ord. § 27.2501 et seq., particularly §§ 27.2504 to 27.2508, incl.)

In article V of the Charter, entitled "Executive and Administrative Service," section 41(c) provides, in part:

> "The City Planning Commission shall be organized as provided by the laws of the State and have such powers and perform such duties as are prescribed by such laws."

This language of the charter cannot properly be construed as excluding or otherwise limiting use of the initiative process for enacting zoning ordinances. The subject of section 41(c) is the City Planning Commission, not the City Council or people of the city. The section does not purport to limit the council or the people in the exercise of their powers otherwise provided for in the charter, nor does it prescribe their organization, powers or duties in the matter of zoning. In this regard the language of section 41(c) does not expressly refer to state zoning law provisions prescribing duties and powers for the City Council. (See, e.g., Gov. Code §§ 65850 and

65861.) The charter provision could and should have done so to make state law zoning duties of city councils applicable to the San Diego City Council.

Section 41(c) does no more than prescribe the organization powers and duties of the City Planning Commission by reference to state law. With respect to zoning, it specifies the extent of the application to the City of San Diego of the state zoning law.[6] Relating expressly to the City Planning Commission and to no other body, section 41(c) adopts the portions of state law prescribing the organization, powers and duties of planning commissions for the San Diego City Planning Commission.

The language of the charter provisions is clear. It is not necessary to use "liberal" construction in favor of initiative and referendum powers to conclude the San Diego City Charter does not require use of the means prescribed by general law to enact a zoning ordinance. The initiative process is specifically and undeniably authorized as a means of adopting *any* ordinance. While it may be the City Planning Commission cannot literally comply with its duties under the charter to follow state laws in adoption of a zoning ordinance (see e.g., Gov. Code §§ 65854 and 65855, San Diego Municipal Code §§ 101.0206-101.0207, relating to giving notice, holding hearings and reporting to the City Council), there is no real contradiction between the charter provisions under consideration. The duties of the City Planning Commission are relegated to the power of the people in this instance. Even viewing the situation as presenting a case of disharmony in the charter provisions, those which reserve the greater power to the people to legislate will prevail. (See *Hunt* v. *Mayor & Council of Riverside*, 31

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[6] Government Code section 65803 provides the state zoning law "shall not apply to a chartered city, except to the extent that the same may be adopted by charter or ordinance of the city." A like provision applies to local planning (Gov. Code § 65700).

Cal. 2d 619, 623; *Duran* v. *Cassidy*, 28 Cal. App. 3d 574, 586; *Atlas Hotels, Inc.* v. *Acker*, 230 Cal. App. 2d 658, 661.) Here, the initiative process would prevail.

Finally, if Government Code section 65800 makes it clear that the provisions of the State Zoning Law only set minimum standards to be observed in local zoning practices (*Taschner* v. *City Council, supra*, 31 Cal. App. 3d 48, 63), then Government Code section 65803 stating the provisions of the chapter do not apply to a chartered city make it equally clear the Legislature intended no such restrictions unless the charter of the city or the ordinance of the council so provided.

Are constitutional guarantees of procedural due process violated by use of the initiative to enact a zoning ordinance.?[7] We hold they are not violated.[8]

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[7] Respondents do not assert the initiative procedure was improperly followed in adopting the ordinance. Nor is there an issue concerning whether the ordinance constitutes a reasonable exercise of the police power. (See *Wilkins* v. *City of San Bernardino*, 29 Cal. 2d 332.)

[8] No California decision represents binding authority on the issue. Generally, the cases intimating the initiative process is constitutionally defective involve general law cities subject to the state zoning law. (See Footnote 5, *supra*.) They utilize the due process rationale as a supportive and alternative reason to the basic holding the state zoning law governing general law cities does not permit use of the initiative process. (See *Hurst* v. *City of Burlingame, supra*, 207 Cal. 134, 140-141, "When the statute requires notice and hearing . . . the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process . . ."; *Laguna Beach Taxpayers' Assn.* v. *City Council, supra*, 187 Cal. App. 2d 412, 417.)

Coming close to a direct holding on the due process issue alone is *Taschner* v. *City Council, supra*, 31 Cal. App. 3d 48, which also involved a general law city. In *Taschner* the court said amendments to the state zoning law ". . . may have vitiated the assumption which formed the basis for the rationale that the mode [prescribed by state law] is the measure of the power . . ." (p. 65), and nevertheless went on to conclude both Government Code section 65853 (mandating zoning ordinances of the type here in question to be

Initially, there is no question the due process rights of reasonable notice and opportunity to be heard attach to persons whose use of property would be affected by a zoning change of the type under consideration (*Scott* v. *City of Indian Wells*, 6 Cal. 3d 541, 548-549; *Kissinger* v. *City of Los Angeles*, 161 Cal. App. 2d 454, 464). The due process clause, however, guarantees no particular form of procedure (*American Toll Bridge Co.* v. *Railroad Com.*, 12 Cal. 2d 184, 207, 208).[9]

In the context of a referendum which changed the zoning of a chartered city the California Supreme Court in 1927 recognized sufficient notice to affected landowners and opportunity for them to be heard is afforded by the election process. In *Dwyer* v. *City Council, supra*, 200 Cal. 505, at page 516, the court said:

> ". . . . By the petition for a referendum the matter has been removed from the forum of the Council to the forum of the electorate. The proponents and opponents are given all the privileges and rights to

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adopted as provided by state law) and due process required compliance with state zoning laws. (See also *People's Lobby, Inc.* v. *Board of Supervisors*, 30 Cal. App. 3d 869, 873-874.)

There is a split of authority on the issue in California and other states. (See *Bayless* v. *Limber, supra*, 26 Cal. App. 3d 463, 467, fn. 3; *Taschner* v. *City Council, supra*, 31 Cal. App. 3d 48, 58, fn. 6.)

[9] An initiative must be published before circulation and the printed sample ballot is mailed to the voters at least 10 days before the election (San Diego Municipal Code §§ 27.2202, 27.2203, 27.2504 and 27.2530).

The purpose of the ballot pamphlet preparation and dissemination is to give the voters information concerning the measure. (See *Hart* v. *Jordan*, 14 Cal. 2d 288, 292.)

Under the state zoning law publication in a newspaper of general circulation at least 10 days before the hearing is the basic notice required in a city like San Diego (Gov. Code § 65854(b)). The city may and has provided for additional mailed or posted notice (San Diego Municipal Code § 101.0206).

express themselves in an open election that a democracy or republican form of government can afford to its citizens upon any municipal or public affair. . . ."

From a notice and hearing standpoint the exercise of the referendum power is distinguishable from the exercise of the initiative in the case of a general law city which must comply with the state zoning law requiring notice and hearing before enacting the ordinance to be submitted to the people (*Johnston* v. *City of Claremont*, *supra*, 49 Cal. 2d 826, 836-837; *Hurst* v. *City of Burlingame*, *supra*, 207 Cal. 134, 141-142). Nevertheless, the elective process occurring after the city council acts on the measure is essentially identical in both cases. (See §§ 27.2530 and 27.2620, San Diego Municipal Code.) The above-quoted principle announced in Dwyer thus applies equally to the initiative process.

Other cases directly dealing with zoning initiatives in chartered cities recognize there is no deprivation of due process in this method. (See *Duran* v. *Cassidy*, *supra*, 28 Cal. App. 3d 574, 586; *Bayless* v. *Limber*, *supra*, 26 Cal. App. 3d 463, 469-470.) In *Bayless* the court observed it would be a strange result indeed if the organic law of the city, its charter, can be revised, amended or repealed by the initiative (Cal. Const., art. 11, § 3, subds. (b) and (c)) while "a lesser law, namely a zoning ordinance, could not be amended by the exercise of this same power." (*Bayless* v. *Limber*, *supra*, 26 Cal. App. 3d 463, 469, fn. 5.)

Arguments criticizing the elective process because the extent to which persons may be heard too often depends on the size of one's pocketbook (*Taschner* v. *City Council*, *supra*, 31 Cal. App. 3d 48, 64) are not convincing in the absence of facts and figures demonstrating the correctness of the assertion and the implications it carries. While it is true people must normally pay to receive widespread distribution of a viewpoint during

an election, the inability of persons, usually property owners, to do so is not demonstrated. Even assuming it is a fact the size of one's pocketbook determines *the extent* to which he may be heard, it is apparent no one is denied a reasonable opportunity to be heard during the elective process. A similar argument may well be raised with regard to wealth and the ability to be heard when applied to notice and hearing before a city planning commission or a city council. It has long been recognized that this reserve power given the people by the initiative process is the counterbalance to the influences of wealth and personal relationships which may occur in the legislative process (*Gayle* v. *Hamm*, 25 Cal. App. 3d 250, 258). The theory of relative wealth thus does not furnish a convincing basis for holding the zoning ordinance adopted by the people at a free and open election does not provide reasonable notice and opportunity to be heard.

Another argument suggested by respondents and mentioned in *Taschner* v. *City Council*, *supra*, 31 Cal. App. 3d 48, at page 64, relates to the fact a city zoning commission or legislative body has more alternative dispositions available (modification, approval, or rejection) than the electorate (approval or rejection only). This is true of any ordinance adopted by the initiative process. The point does not relate to the question whether the elective process affords a reasonable opportunity to be heard so much as it relates to the basic merit of accomplishing a given result by one means as compared to another.[10] It is a fact, however, that in the same way an ordinance may be amended or modified by the council, so the people may, by the initiative process, later adopt an amended or different plan.

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[10] This, of course, is a legislative decision unless constitutional considerations *compel* a different method be utilized.

Of concern in this case is not whether one process for zoning is more meritorious than another as a matter of public policy; rather, it is whether the elective process involved in the jealously guarded initiative procedure affords constitutionally reasonable notice and opportunity to be heard to those who will be affected by a proposed zoning ordinance. The initiative process used by the City of San Diego provides constitutionally reasonable notice and opportunity to be heard. The exercise by the people of their reserved power with respect to this municipal affair must be upheld.

The judgment is reversed.

CERTIFIED FOR PUBLICATION

/s/ Cologne
J.

WE CONCUR:

/s/ Brown
P.J.

/s/ Ault
J.

APPENDIX "C"

MINUTE ORDER AND MEMORANDUM DECISION

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

No. 338110

[Filed Jan. 19, 1973, By M. J. Bradley, Deputy]

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION, a California nonprofit corporation, and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., a California nonprofit corporation,

Plaintiffs,

vs.

CITY COUNCIL OF THE CITY OF SAN DIEGO,

Defendant.

MINUTE ORDER

Motion for summary judgment granted, see Memorandum Decision in case of *Doctors Hospital of San Diego, Incorporated, a California nonprofit corporation* v. *City Council of the City of San Diego*, Superior Court Case Number 337710.

DATED: 19 Jan. 1973

/s/ Louis M. Welsh
LOUIS M. WELSH
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

No. 337710

[Filed Jan. 19, 1973, By M. J. Bradley, Deputy]

DOCTORS HOSPITAL OF SAN DIEGO, INCORPORATED,
a California nonprofit corporation,
Plaintiff,

vs.

CITY COUNSEL OF THE CITY OF SAN DIEGO,
Defendant.

MEMORANDUM DECISION

Plaintiff, a nonprofit hospital, moves for summary judgment to void the initiative zoning ordinance which limits the height of all structures in the "Coastal Zone" [1] to thirty feet. The initiative appeared on the ballot as "Proposition D" at the Municipal Election held November 7, 1972, and it was approved by 63% of the electorate. There is no dispute as to the relevant facts and determination by summary judgment is appropriate (C.C.P. § 437c).

Plaintiff contends that the zoning ordinance is void because (1) it was enacted by the initiative process and "mandatory procedures" for hearings required by the City Charter and the Government Code were not followed; (2) the failure to hold such hearings has deprived plaintiff of that due process of law guaranteed by the

[1] The "Coastal Zone" is defined in the ordinance to include that area from the Northern Limits of the City south to the border of the Republic of Mexico, seaward to the outer limit of city jurisdiction and inland to Highway 5, excepting the area between National City on the south and Laurel Street on the north.

Fourteenth Amendment to the United States Constitution, and (3) the state has occupied or preempted the field through the passage of "Proposition 20" on the same ballot. An opinion written by the City Attorney to the City Council on December 13, 1971, agrees with the plaintiff's position as set forth in points (1) and (2) above, but the City now contends that a recent decision (*Bayless* v. *Limber* [1972], 26 Cal.App.3d 463) requires a different conclusion. After careful study, the Court finds that the ordinance is void for the same reasons originally stated by the City Attorney.

I

UNDER SAN DIEGO'S CHARTER, ZONING MAY NOT BE ENACTED BY THE INITIATIVE PROCEDURE.

General Law Cities (e.g. Coronado) may only enact zoning ordinances by following the procedures established by state law in Government Code §§ 65800 [2] et seq. Under this statute, noticed hearings must be held by both the Planning Commission and the City Council and therefore zoning cannot be accomplished by the vote of the citizens on an initiative ballot. (*Hurst* v. *City of Burlingame* [1929], 207 Cal. 134; *Coronado Shores Condominium* v. *City Council*, San Diego Superior Court No. 333026 [1972].)

On the other hand, Charter Cities, such as San Diego, are governed by their Charters consistent with the Constitution and State preempted subject matter (*Dwyer* v. *City Council* [1927], 200 Cal. 505). Charter Cities are specifically exempted from the Government Code provisions pertaining to zoning, except to the extent that they may be voluntarily adopted by the City's Charter or ordinance (§ 65803). It is plaintiff's contention that San Diego has "adopted" the provisions of the Govern-

[2] All references are to Government Code unless otherwise stated.

ment Code and thus under its Charter and section 65803, it is equally as bound by the state legislation as if it were a General Law City.

The Charter is ambiguous; section 23 provides ". . . the power of the initiative and referendum are hereby reserved to the people of the City. Ordinances may be initiated. . ." But section 41c states: "The City Planning Commission shall be organized as provided by the laws of the State and have such powers and *perform such duties as are prescribed by such laws.*" (Emphasis supplied.) Under "such laws," in the case of an amendment to a zoning ordinance which regulates the height of buildings, the Planning Commission has the duty to notice and hold a public hearing and thereafter to report thereon to the City Council (§§ 65850, 65853, 65854-5). Obviously, such duties cannot be performed by the Planning Commission when the initiative procedure is followed. Since the Commission is enjoined by the Charter to follow such procedures, one must attempt to harmonize the two Charter sections and permit both to operate. To do so, one must read section 23 to provide that "Ordinances [other than zoning ordinances] may be initiated." [3]

This has been the interpretation given to the Charter by the City Attorney. In his letter to the Council dated December 13, 1971, Mr. Teaze stated:

> "As the Council is well aware, the City in enacting zoning ordinances follows procedures established by the State law *pursuant to Section 41 of the City Charter.*" (Emphasis supplied.)

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[3] Compare *Dwyer* v. *City Council* (1927), 200 Cal. 505, 509, 510, 512, where the Court found the use of the words "*Any* proposed ordinance . . ." and "*No* ordinance . . ." in Berkeley's Charter, to be of significance in determining if a zoning ordinance was subject to the referendum. No such language appears in the San Diego Charter.

Moreover, as will appear in the following discussion, such an interpretation is necessary to fulfill the requirements of due process.

II

PROPOSITION "D", BY LIMITING THE HEIGHT OF STRUCTURES, OPERATES SO AS TO DEPRIVE PERSONS OF "SIGNIFICANT PROPERTY INTERESTS" AND THUS A HEARING IS REQUIRED TO SATISFY "DUE PROCESS".

The Supreme Court in *Gilgert* v. *Stockton Port District, et al* (1936), 7 Cal.2d 384, 391, stated:

> "Zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might otherwise be put, but before the owner may thus be deprived of his property and the enjoyment thereof he is entitled to adequate notice and a hearing thereon." (Citing *Berrata* v. *Sales* [1927], 82 Cal.App. 324, with approval.)

Gilgert has been interpreted to require a hearing before passage of a zoning ordinance in order to satisfy "procedural due process." *Metro Realty* v. *County of El Dorado* (1963), 222 Cal.App.2d 508, 518, quoted with approval in *Silvera* v. *City of South Lake Tahoe*, 3 Cal. App. 3d 554, 558 (1970).

In *Berrata*, *supra*, the Court stated at page 327:

> "It needs no citation of authority to support the statement that notice of the proposed passage of a zoning ordinance limiting the use of property which, otherwise, naturally attaches to the property in question is a substantial matter and is one of which property owners are entitled to notice. The property owner, as has been so frequently said in other cases, is entitled to have his day in court."

More recently the Supreme Court, in *Scott* v. *City of Indian Wells* (1972), 6 Cal.3d 541, held that persons out-

side the city limits who will be affected by the granting of a conditional use permit within the city, must be heard. The Court's holding is that "'[C]ommon sense and wise public policy . . . require an opportunity for property owners to be heard before ordinances which substantially affect their property rights are adopted . . .' (*Kissinger* v. *City of Los Angeles* [1958], 161 Cal.App.2d 454, 464 . . .)" The Court specifically observed that the due process clause of the Fourteenth Amendment require a hearing in those zoning matters which deprive a person of "any significant property interest." (At 548, 549.)

In the case at bench we must ask ourselves if the establishment of a thirty foot height limit without first giving a noticed hearing to the affected property owners is constitutionally "fair." "Fairness is determined by balancing the urgency for action on behalf of the public with the degree of private sacrifice involved. Thus, in emergencies no hearing may be required for temporary zoning (*Silvera* v. *City of South Lake Tahoe* [1970], 3 Cal.App.3d 554), but where property interests are significantly affected and there is time for a hearing, due process demands one. (*Scott* v. *City of Indian Wells*, *supra*.)

The City Attorney, in his letter of December 13, 1971, states:

> ". . . it should be observed that the establishing of a 30-foot limitation does affect property rights. The United States Supreme Court said in *West Virginia State Board of Education* v. *Barnette* . . . that 'one's right to . . . property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.' . . .
>
> "A further question then arises as to whether the ordinance would be effective if the voters themselves approved it. On this point we simply refer back to the aforementioned case of *West Virginia* v. *Barnette* and say that the right of an individual to life, liberty and property depend on the outcome of no election" (pp. 4-5).

The desirability of the end result can never influence a court in determining the constitutionality of a statute or ordinance. As stated by Mr. Justice Frankfurter:

> ". . . it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty." (*Osborn* v. *Ozlin* [1940], 310 U.S. 53, 66.)

Today we may have a commendable attempt to save our coast. But tomorrow, if the procedure is permitted, the majority of the electors may vote to zone one side of a residential street for used car lots, and the residents in that area, deprived of a fair hearing, would be unable to test the appropriateness of such decision.

III

DOES THE DECISION IN BAYLISS V. LIMBER, SUPRA, REQUIRE A REEVALUATION OF THE CITY ATTORNEY'S OPINION AND THIS COURT'S CONCLUSION?

It does not.

Bayless petitioned the Court of Appeal for a writ of mandate directing the Whittier City Clerk ". . . to *process* an initiative petition . . . to prohibit oil well drilling within that portion of the City zoned residential." (At 466, emphasis supplied.) The Court issued the writ to the City Clerk requiring him to process the petition and put it on the ballot, *nothing more*.[4] Likewise, San Diego's

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[4] At first blush, one gets a different impression from the case when one reads:

> "The fundamental legal question presented by the petition before us appears to be one of first impression in this state. It is: Does the power of initiating municipal legislation re-

City Attorney, in his December, 1971, opinion (pp. 2-4), advised the Council that it could not refuse to place Proposition "D" on the ballot, even though the ordinance may be unconstitutional. (*Benson* v. *Superior Court*, No. 11642 [1971], Fourth District.) Thus, the decision of the *Bayless* court follows well settled rules and adds nothing to the body of the law.

But the City now contends that this Court should adopt the *Bayless* dictum to the effect that Charter Cities may zone by initiative. There are at least four reasons why the Court should decline this invitation: *First*, it is not the prerogative of the trial court to adopt *obiter dictum* of an intermediate Court of Appeal which conflicts with decisions of the Supreme Court. *Second*, the ordinance proposed by the voters of Whittier more closely resembles a referendum [5] than an initiative. The Court explained: "What is involved in this proceeding is a fundamental change in a policy of many years standing of the City of Whittier. From 1957 to almost 1971 the only oil well drilling permitted within the city was at four specified drilling sites. By ordinance, effective December 24, 1970,

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served to the electors of the City of Whittier by article X, section 1003 of the City Charter extend to the initiation of a proposed mandatory zoning ordinance under which oil drilling would be prohibited in that portion of the city zoned residential?" (At page 467.)

But on analysis one sees that the Court has so circumscribed this "question of first impression" that it is reminiscent of the fictitious case of "*Chicken* v. *Ham*" as reported by A. P. Herbert in the *Uncommon Law* at 72:

> "The point which your lordships are required to decide has never been decided before, and, if your lordships are able to decide it now, it need never be decided again, nor can it be decided otherwise. It is never likely to arise again, but that is another matter."

[5] The people clearly have the right to exercise the referendum to reject a zoning ordinance (*Dwyer* v. *City Council*, ibid., note 3; *O'Loane* v. *O'Rourke* [1965], 231 Cal.App.2d 774.) There is no due process problem because no vested right is being changed (see *Dwyer* at p. 516.)

oil well drilling was placed on an unclassified permit basis for the production of oil, etc., and on a conditional use permit basis for exploratory core hole drilling. Subsequently the City Council granted the American Petrofina Exploration Company an unclassified use permit to drill up to 24 oil wells at a site zoned one family residential and entirely surrounded by property zoned residential." (At pp. 466-467.) In other words, the proposed ordinance would, in reality, disapprove of the 1970 ordinance and prevent the Council from granting *exceptions* to the existing zoning, thus preserving the status quo. *Third*, since no one's property is being rezoned, there is no "due process" problem. And, *fourth*, unlike San Diego, Whittier did not "adopt" any of the provisions of the Government Code.

IV

HAS THE STATE OCCUPIED OR PREEMPTED THE FIELD BY THE PASSAGE OF PROPOSITION #20?

In view of this Court's decision on other grounds, it is unnecessary to reach this question. However, in the Court's opinion, local legislation of the kind exemplified by Proposition "D" can survive alongside the state law (Proposition 20) so long as the former does not frustrate the operation of the latter.

The expression of the people need not be in vain. Appropriate action can be taken by City government in accordance with constitutional principles and consistent with the City Charter.

Plaintiff's motion for summary judgment is granted.

DATED: 19 JAN 1973

/s/ Louis M. Welsh
LOUIS M. WELSH
Judge of the Superior Court

APPENDIX "D"

ORDER DENYING REHEARING

ORDER DUE
February 24, 1975

ORDER DENYING REHEARING

L.A. No. 30250

[Filed Feb. 19, 1975, Supreme Court, G. E. Bishel, Clerk]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION ET AL.,

v.

CITY COUNCIL OF THE CITY OF SAN DIEGO.

Files, J., sitting in place of Mosk, J., who deemed himself disqualified.

Respondents' petition for rehearing DENIED.

McComb, J., and Clark, J., are of the opinion that the petition should be granted.

/s/ Thompson
Deputy

/s/ Wright
Chief Justice

APPENDIX "E"

NOTICE OF APPEAL

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

No. L.A. 30250
Super. Ct. No. 338110

[Filed Apr. 8, 1975, Supreme Court, G. E. Bishel, Clerk]

SAN DIEGO BUILDING CONTRACTORS' ASSOCIATION, and
ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
SAN DIEGO CHAPTER, INC.,
Plaintiffs, Appellants,

vs.

CITY COUNCIL OF THE CITY OF SAN DIEGO,
Defendant, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Plaintiffs, SAN DIEGO BUILDING CONTRACTORS' ASSOCIATION, and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., the Appellants above-named, hereby appeal to the Supreme Court of the

United States from the final judgment of the Supreme Court of the State of California, reversing the judgment in favor of Plaintiffs in this action, entered in this action on February 27, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

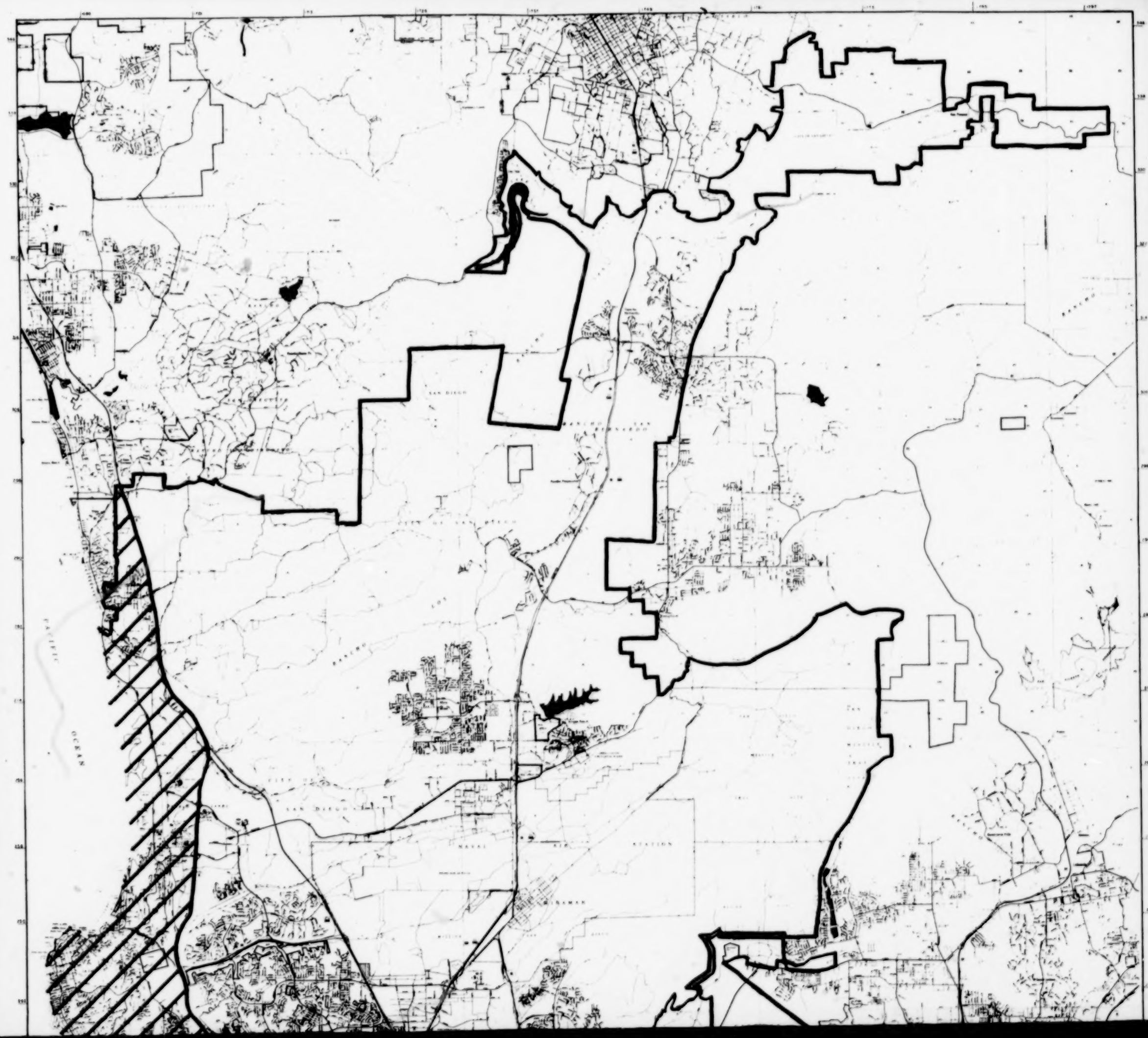
DATED: April 1, 1975.

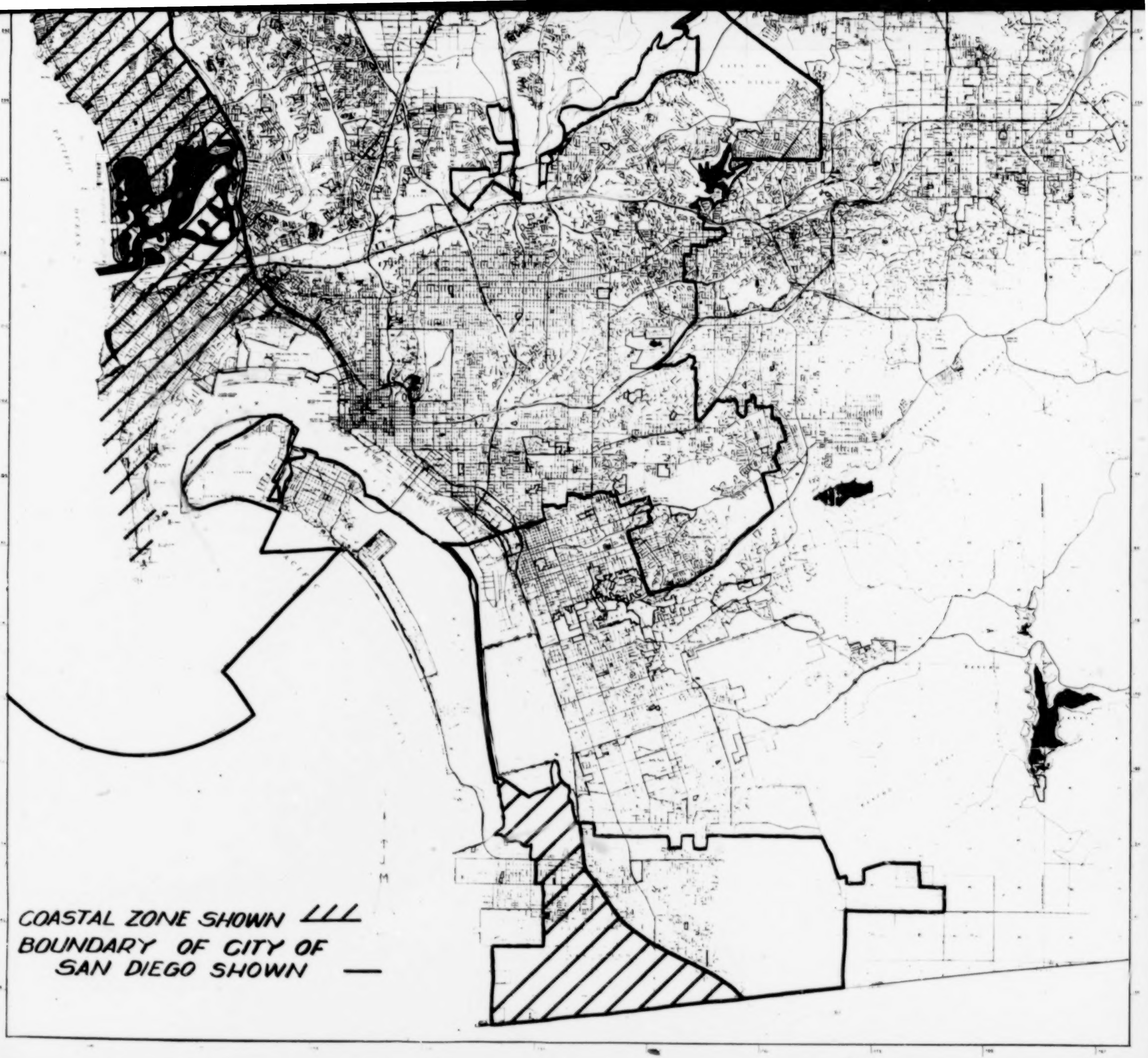
WHITE, PRICE, PETERSON & ROBINSON
A Professional Corporation

By: /s/ Paul A. Peterson
PAUL A. PETERSON
Attorneys for Appellants

APPENDIX "F"

Map of the City of San Diego Showing "Coastal Zone"




COASTAL ZONE SHOWN
BOUNDARY OF CITY OF SAN DIEGO SHOWN